

Social Policy, Law and Protection of Weaker Sections of Society

Proceedings of and Papers presented at the UGC Seminar
University of Jammu

Edited by
D.N. SARAF

With a Foreword by
V. KHALID

259

EASTERN BOOK COMPANY

About the Book

This scholarly work unfolds the collective wisdom of legal luminaries on a subject of great topical interest.

The book focusses attention on the myriad problems of the weaker segments of the society. Broadly speaking the following areas have been covered:—

1. Equal Justice for weaker sections: Identification of Backward Classes, Reservation Policy, Protective Discrimination, Problem of Untouchability etc.
2. Justice in Litigation: Para Legal workers and Justice to the Poor, Legal Aid, Preventive Detention Jurisprudence, Prison Justice, Equity and Sales Tax in India etc.
3. Protection of Women: Women in the Workforce, Women in Marriage, Protection of the Rights of Women, Exploitation of Women, Legal Services for Women, Dowry, Polygamy, Female Succession, Right to Maintenance, Rape, Population Control, Abortion etc.
4. Protection of Children: Vagrancy, Beggary and Status Crimes, Social Policy for Children, Children's Court System, Probation etc.
5. Protection of Labour: Protection of Interests of Labour, Accidents in Industrial Undertakings, Bonded Labour, Child Labour, etc.

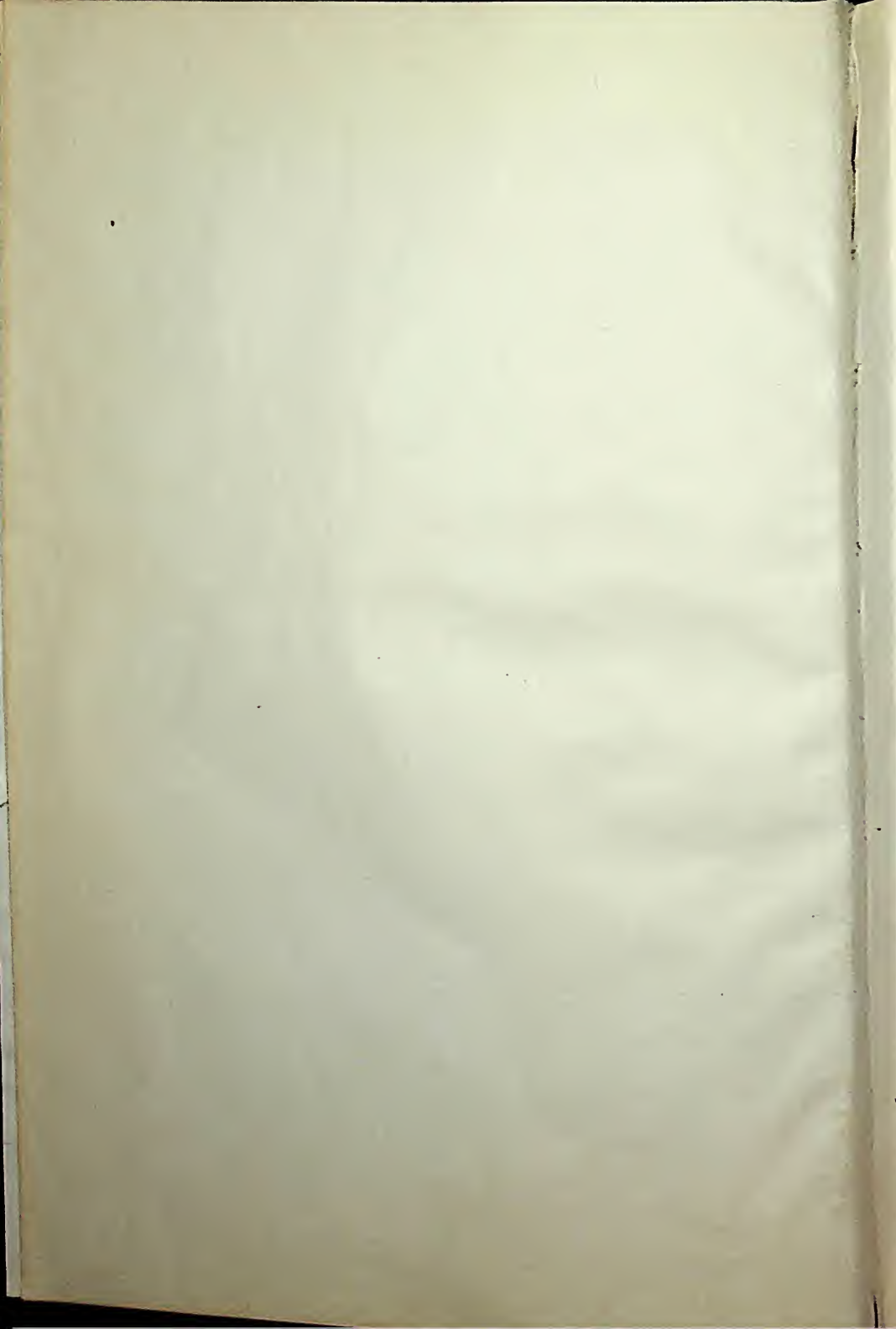
A must book for anyone interested in the subject.

T. N. Shetty
Reader-Dentist
Jammu Univ.

शारदा पुस्तकालय

(संशोधन या केंद्र)

कॉपीक 259-



Social Policy, Law
and
Protection of Weaker
Sections of Society

THE
LIBRARY
OF THE
MUSEUM OF
COMPARATIVE ZOOLOGY
AND ANATOMY
HARVARD UNIVERSITY

Social Policy, Law and Protection of Weaker Sections of Society

*Proceedings of and Papers presented at the UGC Seminar
University of Jammu*

Edited by

D.N. SARAF

LL.M. (DELHI), M.C.L., J.S.D. (COLUMBIA)

Prof. and Head of the Deptt. of Law
and Dean, Faculty of Law
University of Jammu

With a Foreword by

V. KHALID

Judge, Supreme Court of India

EASTERN BOOK COMPANY

ALSO AVAILABLE AT

EASTERN BOOK CO. (SALES)

KASHMERE GATE, DELHI-6

(Phone : 2917616)

MANAV LAW HOUSE

2-A, STRACHEY ROAD

CIVIL LINES

ALLAHABAD

(Phone : 3369)

Pakistan Law House

Pakistan Chowk,

G.P.O. Box 90,

Karachi-1 (Pakistan)

Tele. : 212455

Malayan Law Journal (Pte) Ltd.

3, Shenton Way

#14-03, Shenton House,

Singapore-0106

Republic of Singapore

Tel. : 2203684 (4 Lines)

Malayan Law Journal (Pte) Ltd.

4th Floor, Bangunan Ming,

#04-04, Jalan Bukit Nanas,

50250, Kuala Lumpur

Malaysia

State Mutual Book & Periodical
Service Ltd.

521, Fifth Avenue, New York

New York-10017 (U.S.A.)

With best compliments of
the Publishers

1986

Rs. 175.00

ISBN — 81 — 7012 — 339 — 9

ALL RIGHTS OF PUBLICATION RESERVED WITH THE PUBLISHERS

PUBLISHED BY EASTERN BOOK CO., 34, LALBAGH, LUCKNOW
PRINTED AT LAW TIMES PRESS, 56/C, SINGAR NAGAR, LUCKNOW

Foreword

The major part of my tenure as Chief Justice of J & K High Court was spent in Jammu. There I came in close contact with Dr. D. N. Saraf, Professor and Head of the Department of Law, University of Jammu. I was deeply impressed with his erudition and more with the devotion with which he worked for his department.

The Seminar on "Social Policy, Law and Protection of Weaker Sections of the Society" held under the auspices of the Department of Law, of which he was the moving spirit, ably assisted by his associates, was a commendable achievement, worthy of emulation. I am extremely happy to learn that Eastern Book Company of Lucknow has agreed to publish the proceedings of the Seminar. The papers read at the Seminar have been given to me for my perusal for writing a 'Foreword' to the book to be published. I must confess I have not been able to do justice to the various papers by going through them in full.

I attended the inauguration ceremony. I delivered the valedictory address. In between several papers were read. The papers so read display great scholarship and in-depth study of the subjects dealt with in them. The subjects chosen for the Seminar were of great topical interest. The papers read focussed attention on the myriad problems facing the society in the context of injustice to the weaker sections. The papers have brought out in sharp focus the manifold problems facing women and the oppressed and backward sections of the society.

The problems facing women have been given great importance in view of the disturbing disclosures that the news media bring forth day in and day out. The papers read on the subject have laid bare before the public the inequalities and inhuman treatment meted out to them. The evils of the dowry system and the consequent reprehensible cruelty in the form of bride burning etc. have received great attention at the hands of the participants.

IV SOCIAL POLICY, LAW AND PROTECTION OF WEAKER SECTIONS

The section dealing with equal justice for weaker section and justice in litigation contains papers replete with new thoughts and suggestions for evolving a society free from inequality and for creating an egalitarian society.

Protection of children is another subject dealt with in some detail. The papers contain valuable suggestions for ameliorating the conditions of erring children, to control juvenile delinquency and to combat the evils of vagrancy, beggary and similar ills that afflict the juvenile section of the society.

The papers dealing with protection of labour have emphasised the need to give to the labour its dues. Various suggestions are seen made for protection of labour, for raising their status by a gradual participation in the capital, to prevent bonded labour in any form in society, to prevent child labour and to create a situation consistent with the philosophy of the Constitution and thus to usher in absolute equality before law and equal opportunity to those placed less fortunate in life.

I firmly believe that the publication will be well received by the public at large in general and by those interested in law in particular. I wish the Department of Law, Jammu University many more laurels in future.

V. KHALID

Judge, Supreme Court of India.

P r e f a c e

The Department of Law of the University of Jammu was set up in the year 1969 and within the last sixteen years it has emerged as an important centre of legal studies and research. The Faculty not only provides instructions in modern and socially relevant courses ; it has specialised in socio-legal studies and empirical research. This is the second seminar of national importance organised by the Faculty of Law.

The articles published in this volume cover diverse themes. The perspectives of lawyers, economists, sociologists and political scientists on the problems of weaker segments of the society have been incorporated and discussed. Though it is hard to find consensus, the conclusions of the seminarians are open-ended and objective. These should lead to further pointed studies on the subject.

Many organisations and persons have helped in several ways to make the seminar a success. The University Grants Commission provided substantial financial assistance for holding the seminar. The Vice-Chancellor of the University of Jammu took personal interest and placed at the disposal of the organisers of the seminar numerous facilities.

Dr. K. L. Bhatia, Reader in Law, took keen interest in editing the seminar papers. He also helped in writing introduction to this volume. One of the unique features of the seminar was that almost all the colleagues in the department took interest to make the seminar a grand success, and almost all of them presented the research papers on the different themes of the seminar.

I would like to record our warmest appreciation of the Hon'ble Mr. Justice V. Khalid, Judge, Supreme Court of India, who has so kindly contributed a Foreword to this volume.

M/s Eastern Book Company, Lucknow, generously agreed to publish the proceedings and papers of the Seminar. This difficult and stupendous task has been done by them with great care and competence. We are beholden to the management for doing this job in a satisfactory manner.

Jammu

—D. N. SARAF

Introduction

With the advent of Independence, the Centre and State Govts. in India have launched a vigorous search for identification of backward classes with a view to help them to attain a minimum standard of existence and put an end to discriminations of various kinds to which they had been subjected for centuries. In a feudal and caste-ridden society the domination of the rich and higher castes had brought about the situation in which a majority of the people in India suffered from serious social and economic handicaps. The framers of the Indian Constitution formulated the social policy for the upliftment of backward classes by providing in Articles 15 and 16 that :

- (a) Nothing shall prevent the State from making any special provision for the advancement of any socially and educationally backward classes of citizens, for the scheduled castes and the scheduled tribes.
- (b) Nothing... shall prevent the State from making any provision for the reservation of appointments or posts in favour of any backward class of citizens which, in the opinion of the State, is not adequately represented in the services under the State.

It is obvious that the founding fathers of the Constitution identified scheduled castes and scheduled tribes as backward classes and further authorised the State to identify *other* backward classes for the purpose of according protective discrimination. The Governments in the States have from time to time made attempts to identify backward classes in each state. Many of such attempts made by the States have been found unconstitutional by the judiciary. The Central Government appointed two Commissions for this purpose and the reports submitted by these Commissions to the Government have generated heat and controversy. It has to be admitted that we have miserably failed in evolving objective, fair and dependable criteria to identify *other* backward classes. The reasons for this are not far to seek. It has been estimated that more than 70% of population in India suffer from acute social

and economic handicaps. The governments have generally been led by political considerations rather than merits in their search for identification of other backward classes. In some States attempts have been made to include among the backward classes people on the basis of caste or community without reference to their social and economic backwardness. The results have been disastrous. By according reservations in educational institutions and services to unmeritorious and undeserving on caste and community considerations not only is a set-back being caused to quality and effective functioning of government but resentment and frustration in ample measure has fallen to the lot of deserving and the meritorious.

It is unfortunate that the term backward classes has been used in the Constitution. The notion of backward class is generally associated with deprivation as a result of belonging to a class, i. e., a caste or community. Our search should have been for weaker sections. Among the weaker sections one could include scheduled castes, scheduled tribes and others who on the basis of economic, social and educational backwardness would need protection and support. It is well-known that for centuries economic and social disabilities of certain sections of the people have been the main cause of backwardness. Thus, women, children and unorganised labour irrespective of their caste or community have been neglected. It is for this reason that the constitutional goals of equality, freedom, social justice and the dignity of the individual have not been realised. Keeping this background in mind, the organisers of the seminar on Social Policy, Law and Protection of Weaker Sections of the Society decided that the common theme of the discussions would be to make an in-depth study of the social policy and its implementation through the instrumentality of the law. The objectives statement, therefore, provided that the main aim of the seminar would be "to assess the role of law as a means of promoting and implementing social policy and in this connection a consideration may be given to :

- (a) the manner in which social policy is formulated and projected by the legislature ;
- (b) how policy goals are interpreted and applied by the courts and officials ;

- (c) the extent to which divergent and conflicting attitudes of individuals and groups affect the implementation of the social policy”.

To appease public sentiments and satisfy demand for urgent reforms the State has chosen the easy expedient of enacting social policy into law without, at the same time, ensuring effective functioning of the enforcement machinery. A community with acute social and economic problems has the natural tendency of drawing over ambitious plans to achieve quick results through compulsory processes of the law. It overlooks the well-known historical and sociological truth that law is only one means of social control, and there are limits of effective legal action. Little thought is invested for translating social policy into action through dependable and effective methods.

The seminar was held in the Department of Law, University of Jammu from 11th to 13th February, 1984. It was inaugurated by Hon'ble Mr. Justice R. N. Misra, Judge, Supreme Court of India ; the Chief Minister of J & K State who is the Pro-Chancellor of Jammu University presided over the inaugural function which was held on 11th February, 1984 in the Faculty of Law of the University of Jammu. The judges, leading advocates and prominent citizens attended the inaugural function. Delegates from all over India mainly from the Universities took part in the five sessions of the seminar. One of the special features of the seminar was that the participants belonged to many disciplines including sociology, economics, political science and public administration. As many as 40 papers subscribed by the delegates and others were discussed. The valedictory address was delivered by Hon'ble Mr. Justice V. Khalid the then Chief Justice of the J & K High Court. The reports of the proceedings of the sessions on :

- (i) Equal Justice for Weaker Sections,
- (ii) Justice and Litigation,
- (iii) Protection of Women,
- (iv) Protection of Children, and
- (v) Protection of Labour

together with the inaugural address of the Hon'ble Mr. Justice R. N. Misra and valedictory address of the Hon'ble Mr. Justice V. Khalid have been published in this volume.

— This volume is being published in the hope that the deliberations of the seminar on such important themes of national importance would generate further interest among the scholars and statesmen in finding solutions to the problem of according protection to the weaker sections.

—*Editor*

Our Contributors

1. Agrawala, S. K. Vice-Chancellor
Agra University
Agra
2. Arora, K. K. Reader, Department of Law,
University of Jammu,
Jammu—180 001.
3. Bahadur, Krishna Professor of Law,
School of Law,
Banaras Hindu University,
Varanasi (U. P.)
4. Bhatia, K. L. Reader,
Department of Law,
University of Jammu,
Jammu—180 001.
5. Bhushan, Vidya Reader,
Department of Political Science,
University of Jammu,
Jammu—180 001.
6. Borale, P. T. Former Mayor Bombay,
Municipal Building,
15th Road, Sion (East)
Bombay.
7. Chhabra, K. S. Professor of Law,
Head, Department of Law,
and Dean, Faculty of Law,
Guru Nanak Dev University
Amritsar.
8. Chowdhary, Rekha Lecturer,
Department of Political Science,
University of Jammu,
Jammu—180 001.

XII SOCIAL POLICY, LAW AND PROTECTION OF WEAKER SECTIONS

- | | |
|---------------------|--|
| 9. Errabbi, B. | Reader,
Faculty of Law,
University of Delhi,
Delhi—110 007. |
| 10. Ganai, N. A. | Reader,
Department of Law,
University of Jammu,
Jammu—180 001. |
| 11. Jaswal, P. S. | Lecturer,
Department of Law,
University of Jammu,
Jammu—180 001. |
| 12. Kapoor, V. K. | Lecturer,
Department of Law,
University of Jammu,
Jammu—180 001. |
| 13. Khalid, V. | Judge,
Supreme Court of India,
New Delhi—110 001. |
| 14. Kotru, R. K. | Director (Finance)
J & K Government, Civil Secretariat,
Jammu—180 001. |
| 15. Krishnan, P. G. | Professor of Law,
Faculty of Law,
University of Delhi,
Delhi—110 007. |
| 16. Kumar, Virendra | Professor of Law,
Chairman,
Department of Laws,
Punjab University,
Chandigarh—160 014. |
| 17. Kumari, Ved | Lecturer,
Department of Law,
University of Jammu,
Jammu—180 001. |

18. Matta, A. M. Lecturer,
Department of Law,
University of Kashmir,
Srinagar (J & K).
19. Massey, I. P. Professor of Law,
Head, Department of Laws, and
Dean, Faculty of Law,
Himachal Pradesh University,
Simla—171 005.
20. Menon, N.R. Madhava Professor of Law,
Faculty of Law,
University of Delhi,
Delhi—110 007.
21. Misra, R. N. Judge,
Supreme Court of India,
New Delhi—110 007.
22. Oommen, T. K. Professor,
Chairman,
Centre for the Studies of Social
Systems,
Jawaharlal Nehru University,
New Delhi—110 007.
23. Panda, Jayaram Lecturer,
Department of Economics,
University of Jammu,
Jammu—180 001.
24. Pande, B. B. Reader,
Faculty of Law,
University of Delhi,
Delhi—110 007.
25. Parihar, Lalita Reader,
Department of Law,
University of Jammu,
Jammu—180 001.
26. Raina, Subash C. Lecturer,
Department of Law,
University of Jammu,
Jammu—180 001.

27. Razdan, Usha Lecturer,
Department of Law,
University of Jammu,
Jammu—180 001.
28. Rekhi, V. S. Professor of Law, and
Dean, Faculty of Law,
Aligarh Muslim University,
Aligarh.
29. Sadhu, A. N. Professor and Head,
Department of Economics,
University of Jammu,
Jammu—180 001.
30. Saraf, D. N. Professor of Law,
Head, Department of Law, and
Dean, Faculty of Law,
University of Jammu,
Jammu—180 001.
31. Sathe, S. P. Professor of Law,
Principal,
ILS Law College,
Pune—411 004.
32. Shalla, T. N. Reader,
Department of Law,
University of Jammu,
Jammu—180 001.
33. Sharma, S. K. Lecturer,
Department of Law,
University of Jammu,
Jammu—180 001.
34. Sehgal, B. P. S. Reader,
Department of Law,
University of Jammu,
Jammu—180 001.
35. Singh, Amarjeet Reader,
Department of Economics,
University of Jammu,
Jammu—180 001.

36. Singh, Shyam Reader,
Department of Law,
University of Jammu,
Jammu—180 001.
37. Singh, S. G. Professor of Law,
Dean of Education,
Guru Nanak Dev University,
Jalandhar Centre,
Jalandhar (Punjab).
38. Srivastava, Suresh C. Chairman,
Faculty of Law,
Kurukshetra University,
Kurukshetra (Haryana).
39. Tripathi, G. P. Professor of Law,
Head, Department of Law, and
Dean, Faculty of Law,
Dr. Hari Singh Gour Vishwavid-
yalaya,
Sagar (M. P.)

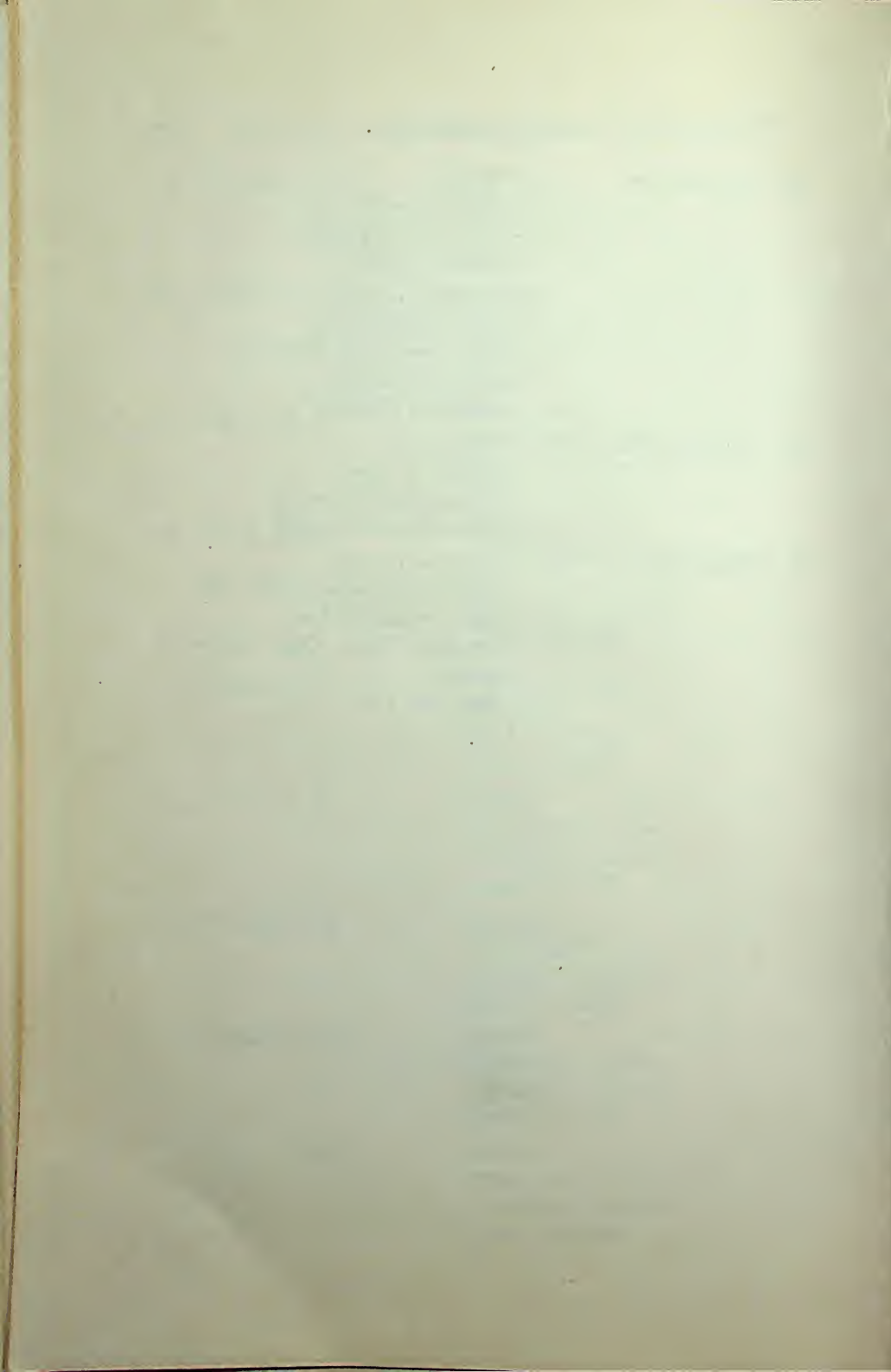


Table of Contents

	<i>Pages</i>
Foreword	III
Preface	V
Introduction	VII
List of Contributors	XI
SECTION 1	
SEMINAR PROCEEDINGS	
1. Statement of Objectives. D.N. Saraf ..	3
2. Inaugural Address. Hon'ble Mr. Justice R.N. Misra ..	7
3. Valedictory Address. Hon'ble Mr. Justice V. Khalid ..	13
4. Reports of the Sessional Chairpersons. ..	29
SECTION 2	
EQUAL JUSTICE FOR WEAKER SECTIONS	
1. Identification of Backward Classes—Law and Social Policy. S. K. Agrawala ..	41
2. On Operationalising Backwardness. V. S. Rekhi ..	59
3. Backwardness in India—A Judicial Dilemma. K. K. Arora ..	80
4. Dynamics of Reservation Policy under the Indian Constitution : A Working Paper. T. N. Shalla ..	99
5. Protective Discrimination : Constitutional Prescription and Judicial Perception. B. Errabbi ..	133
6. Problem of Untouchability and Former Untouchables. P. T. Borale ..	154

SECTION 3

JUSTICE IN LITIGATION

1. Para Legal Workers and Justice to the Poor.	N. R. Madhava Menon	..	171
2. Legal Aid in Criminal Proceedings.	K. S. Chhabra	..	179
3. Equal Justice in Preventive Detention Jurisprudence Some Projection for Legislative Reform.	I. P. Massey	..	186
4. Prison Justice : The Judicial Ethos and Human Rights of the Prisoners.	S. K. Sharma	..	204
5. Legal Aid Ethos and Mandamus : Some Observations.	P. S. Jaswal	..	221
6. Legal Aid and Legal Advice in Madhya Pradesh : A Protecting Arm of the State to the Weaker Sections of the Society.	G. P. Tripathi	..	240
7. Equity and Sales Tax in India with Special Reference to J & K State.	R. K. Kotru	..	259

SECTION 4

PROTECTION OF WOMEN

1. Women in the Workforce, Their Legal Rights and Problems : Towards a Perspective.	T. K. Oommen	..	269
2. From Wife to Woman : From Patch-up to Break-Down.	Krishna Bahadur	..	274
3. The Protection of the Rights of Women in J & K State : A Historico-Socio-Politico and Constitutional Analysis.	Vidya Bhushan	..	283

		<i>Pages</i>
4. Exploitation of Women : A Study of Social Norms	Rekha Chowdhary ..	294
5. Legal Services for Women	S. P. Sathe ..	304
6. An Evaluation of Dowry Prohibition Law.	Virendra Kumar ..	325
7. Dowry System in India : A Socio-Legal Analysis.	S. K. Sharma ..	343
8. Polygamy—A Negation of Quran.	K. K. Arora ..	368
9. The Paradox of Female Succession in Customary Law in Kashmir : The Institution of <i>Dukhtari- Khana-Nashin</i> .	N. A. Ganai ..	376
10. Muslim Divorcee's Right to Maintenance : Recent Judicial Trends in India.	Lalita Parihar ..	405
11. Trial Procedure for Rape : A Critical Appraisal.	Shyam Singh ..	430
12. Measures of Population Control and Women's Rights	S.G. Singh ..	442
13. Emancipation of Women and Population Control.	B. P. S. Sehgal ..	455
14. Morality, Law and Abor- tion : A Plea for Libera- lisation.	V. K. Kapoor ..	462

SECTION 5

PROTECTION OF CHILDREN

1. Vagrancy, Beggary and Status Crimes.	B. B. Pande ..	487
2. Retrospective and Pros- pective Reflections on Social Policy for Children in Need of Care and Protection.	Ved Kumari ..	520
3. An Analysis of Children's Court System.	Usha Razdan ..	536

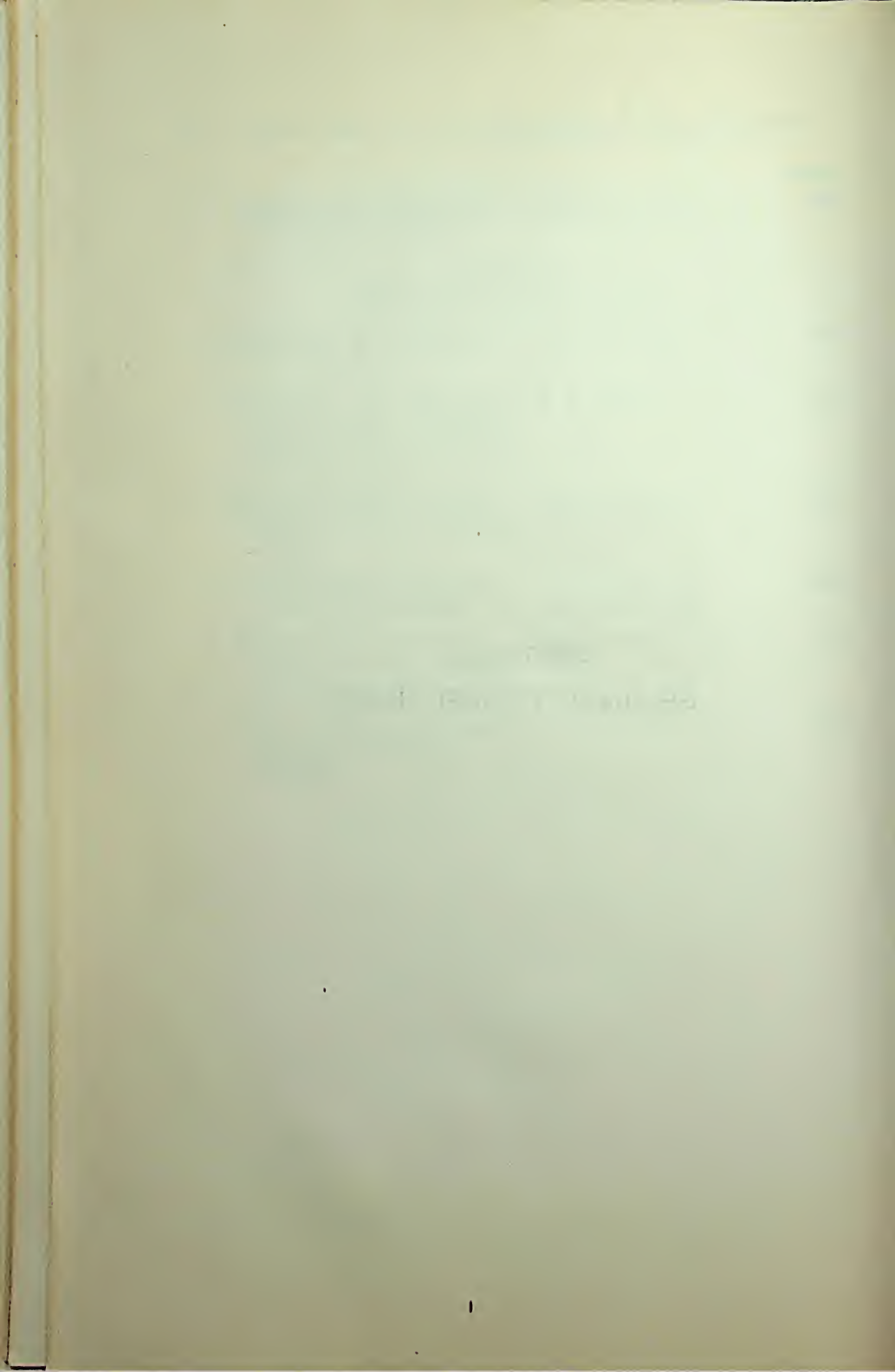
		<i>Pages</i>
4. Problems and Perspectives of Probation in India.	Subash C. Raina	.. 560

SECTION 6

PROTECTION OF LABOUR

1. Protection of the Interests of Labour.	P. G. Krishnan	.. 579
2. Accidents in Industrial Undertakings—An Examination of Causes of Work-Related Accidents.	K. L. Bhatia	.. 591
3. Bonded Labour in a Semi-Feudal and Semi-Capitalist Society.	Jayaram Panda	.. 616
4. Socio-Economic Aspects of Child Labour in India.	A. N. Sadhu and Amarjeet Singh	.. 626
5. Role of Law Towards Prevention of Exploitation of Child Labour.	Suresh C. Srivastava	.. 637
6. Child Labour in Carpet Weaving Centres of Kashmir.	A. M. Matta	.. 649

SECTION 1
SEMINAR PROCEEDINGS



OBJECTIVES OF THE SEMINAR

D. N. SARAF

The Preamble of the Constitution of India holds out a promise to all the citizens of India of securing social, economic and political justice. The term justice has been concretised by laying down minimum standards of substantive and procedural justice. The notion of justice enshrined in the Constitution is based on the equality principle. In a caste-ridden and feudal social order the principle of equality runs counter to and is at war with prevalent social beliefs, mores and institutions. In order to ensure that new institutions based upon principles of equality grow, and benefits accruing from this revolutionary principle accrue to the segment of citizens which for centuries were deprived of elemental human rights through discriminatory treatment, vigilance is needed of those who formulate and implement social policy, and by associations and institutions set up to safeguard the interests of these sections of the society. Revolutionary changes in social policy necessitate adoption of strategies of an unconventional type to ensure an orderly transition from the old to the new, from dependence to self-reliance, from serfdom to freedom and from want to plenty. In democratic societies the chief strategy followed has been to translate social policy into law and to confer legal rights on the beneficiaries. Such societies entertain deep respect for the rule of law which in its turn generates the confidence that the aggrieved individuals will seek the intervention of the courts to safeguard these rights.'

For a long time it was assumed that once the social policy was enacted into law, the beneficiaries would have recourse to the ordinary courts to vindicate their rights, and, the legal procedures would ensure an effective implementation of the social

* LL.M. (Delhi); M.C.L., J.S.D. (Columbia), Professor and Head of the Department of Law and Dean, Faculty of Law, University of Jammu, Jammu.

policy. Insights into the realities of the judicial process, however, have revealed that the adversary system of litigation works when both the parties to litigation are equally resourceful. If one of the parties, because of an economic handicap, is unable to bear the costs of litigation it is difficult for him to defend his rights. He may either abandon the right by opting not to pursue a legal remedy or lose the case as a result of his not being able to afford the costs of litigation, and, in particular, the fee of a competent lawyer. To ensure that no one is compelled to abandon the legal rights or is unable to defend himself when his right to life and personal liberties are in jeopardy, provision for adequate legal services has been made in almost all the western democratic societies. In India little precious has been done in this regard. The Justice Bhagwati Report touches only a fringe of the problem. For access to justice granting of legal aid alone is not enough. Our social and political institutions must be reorganised and revitalized in a manner to ensure that large segments of the population which for centuries remained outside the mainstream of community life receive the benefits and privileges of the modern welfare state.

There is no doubt that the hierarchical caste-system in India left out certain castes from economic and social progress; consequently the relevance of caste or community to determining backwardness could not be minimized. At the same time the vicious circle of granting privileges and benefits on the basis of caste and community will never come to an end; it will degenerate into discrimination of a serious type resulting in class war, inefficiency and dependence. One of the major occupations of the Seminar would, therefore, be to have a fresh look on the social policy of granting equal rights to all irrespective of caste and community, and, of making reservations in educational institutions and employment in favour of certain sections of the community predominantly on the basis of caste or class, the manner or style of its implementation and the extent to which the stated objectives have been realized.

Due to historical reasons women in our society have occupied a subordinate position. The social policy did not favour economic independence of women. The social system operated

harshly against them in such important matters as inheritance, marriage, divorce, adoption and maintenance. Since the advent of independence there has been a shift in the social policy towards granting of equal rights to women in economic and social fields. Several laws have been enacted to give effect to this social policy. To protect women from moral and material abandonment, exploitation and abuse, the Central and State Governments have adopted several measures including enactment of laws and setting up of social welfare boards. In spite of this, it could hardly be asserted that women enjoy equal rights with men. The seminar will strive to review the social policy in this regard and assess the role of law and the implementation machinery set up to protect this class of citizens.

Yet another theme of the seminar would be to review the laws and social policy relating to protection of children. In spite of the National Policy for Children, 1974, and the International Year of the child, 1979, children remain a neglected and exploited lot in our country. There has been a steady rise in juvenile delinquency. Rapid urbanisation within the last three decades has exposed the child to hazards of a different type. Family break-up, accidental death or unemployment of the bread earner and preoccupation of the parents with complex problems of city life end up in neglect of children. Children Acts which were enacted by the Central and State Governments raised the hope that something substantial would be done to improve the lot of children who exhibited deviant behaviour or who are neglected by parents. Not much progress has been made in this direction. We have yet to develop dependable implementation machinery to give effect to the policy goals in respect of children.

Last, but not the least, an important area of discussion relates to protection of the labour. Since independence labour legislation has proliferated and become complex. The social policy of ameliorating the condition of this class of citizens has yet to be realised. Bonded labour still exists in a subtle form and many devices have been worked out to defeat the national wage policy. The members of the labour force are not adequately protected against hazards of the industry such as accidental death, disability and occupational disease. The seminar will, therefore, endeavour

to assess the magnitude of the problem, identify and gain insight into the causes which tend to defeat social policy and the functioning of the implementation machinery.

In conclusion, it is well to remember that seminars of this kind have the primary aim of provoking fresh thinking on knotty problems and not devising any magic solutions. With so many distinguished participants around who have spent their precious time in preparing their papers on the themes of the seminar, I have no doubt that this aim will be realized in an ample measure.

INAUGURAL ADDRESS

JUSTICE RANGANATH MISRA

I am thankful to the Faculty of Law of the University of Jammu for having invited me to inaugurate the seminar on 'Social Policy, Law and Protection of Weaker Sections of the Society', organised under the auspices of the University Grants Commission.

There can be no two opinions that the subject chosen for the seminar is a topic of common interest and is an obstinate problem which has been agitating every conscious mind in our society. A look at the historical past indicates that the focus of the foreign ruler was not on maintaining social equilibrium. In fact, by maintaining disparity and lack of cohesion in the society of this country, the foreign ruler found it convenient to satisfy its desires. One of the first tasks that faced the new-born nation was, therefore, to provide appropriate cushion to the weaker sections of the society so that at the earliest possible opportunity those that had trailed behind could come up to the main line and enter into the common national stream. That came to be debated by the Constituent Assembly, and the Constitution fathers took great care to make provision for protection of the weaker sections, particularly those belonging to the Scheduled Castes and the Scheduled Tribes. Provisions in the Constitution given to the nation more than 34 years back still remain to be translated into practice. Initially the stalwarts who had fought for our independence and had engaged themselves in giving us the Constitution had hoped that a period of 15 years would be adequate to eliminate the backwardness and bring about a single totality of social existence. This has, however, not been possible and it is the opinion of many that implementation has not been proper.

* Judge, Supreme Court of India.

I am happy to find that your Faculty has planned to raise a systematic debate over the issue and you have prosposed to give consideration to three aspects both vital and germane to the matter: (i) the manner in which social policy is formulated and projected by the legislature; (ii) how policy goals are interpreted and applied by the courts and officials; and (iii) the extent to which divergent and conflicting attitudes of individuals and groups affect the social policy. I am equally happy to find that you have also appropriately indicated the areas over which the debates here in the seminar would be addressed, viz., (i) equal justice for weaker sections; (ii) protection of women; (iii) protection of children; and (iv) protection of the interests of the labour.

If law provides that all citizens must be of an equal height, those whom nature has made dwarf must have artificial implements to raise their heights. Those of you who have observant eyes must have seen young ladies anxious to look tall to take such measures. The Constitution gave a cushion for an initial period with a view to bringing weaker sections to the national channel by making provision in such a way that untouchability was abolished. Provision was made while implementing the Directive Principles of State Policy for protection of the weaker sections. The Civil Rights Protection Act, 1975, is essentially a law in this direction. - Reservations in schools, colleges, technical institutions are also a similar step. If one looks at the heap of laws, rules and administrative directions issued in this regard, one is bewildered that with all these provisions, the out-turn in almost 3½ scores of years has not been of any appreciable quantity and quality. On the other hand, for quite some time there has been a spate of violations arising out of struggles between the weaker sections and the economically and/or otherwise stronger sections of the community.

With a view to making it possible for the poor litigants to reach the courts for protection of their rights and for vindication of their grievances permissible within the ambit of law, schemes of legal aid keeping in view the requirements of Directive Principles have been set up and substantial progress has been made in many of the States in this direction. Identification of the weaker sections remains yet to be made and the field in which oppression

still prevails has to be brought to the national focus so that immediate action can be taken to eliminate it. The judicial system has been criticised for opening its doors to the rich only. While the criticism seems to be exaggerated, it cannot be said to be without any justification. Instances have come to light where mainly on account of poverty people have been languishing in the jails. The Supreme Court and thereafter most of the High Courts have taken a new stride in this direction and the governments are being made conscious of their duties, obligations and responsibilities in the matter. The field of public interest litigation is widening up and that certainly would help to raise the citizens' consciousness about the right way of living.

Ours is a country where traditionally women had always been honoured. The English phrase 'better half' applied very well to the traditional view in India so far as women are concerned. In this country women were looked upon with reverence. Every lady not being the wife was either a sister or a relation to be revered. Marriage had always been considered to be a sacrament and when a bride and a groom came together to make their own world, it had been taken to be a great event. Dowry was unknown in the Indian tradition. For some time the issue of dowry has become a problem. Hundreds of young women have to face unimaginable tortures and even loss of life on that score. Suddenly the treatment of women in society has become a greater problem than it could ever have been apprehended. Violation of the body of women, hitherto considered sacred, seems to have become rampant. These obviously are the outcome of the position that tradition has been given a total go by. Parliament has brought about amendment of the Indian Penal Code, the Code of Criminal Procedure as also the Evidence Act to meet the challenge. New laws are being framed to protect women. The Constitution fathers intended equality of man and woman in a free India. Woman today has to face odds in society and, therefore, is trying to raise a fight against man. Men live for women and women for men had been the way of life. There can be no doubt that the world of men without women cannot exist. Similarly, there would be no need for women if there were no men in society. Nature has created them as complementary to one another. How can there be an infight between two such indispens-

able and complementary groups of the human race ! Society is facing a challenge arising out of lack of adjustment. The family pattern has broken ; urbanisation seems to be the order of the day and there is a continuous shift from the rural areas to cities. This has a direct impact on the agricultural base and leads to the overcrowding of the urban areas. Added to it is the threat from population explosion. All the plans which are being made do not prove to be effective on account of the unprecedented growth of population and though there has been considerable development in the field of agriculture, industrial production as also in several other directions, it has no visible bearing on account of the explosion of population.

Undoubtedly, children of today are the citizens of tomorrow and the country's future would very much depend upon how the children of today are reared. The Constitution contains the directive principle that there should be free and compulsory education for all children until they complete the age of 14 years. This was envisaged to materialise within 10 years from 1950. This, however, has still remained as the cherished hope of the Constitution fathers. Though there has been expansion in the field of education, every young boy or girl within the age group indicated has not learnt to go to school yet. Society has not been able to provide space in educational institutions for all the youngsters within the prescribed age group in the country.

The Constitution required legislation to provide a living wage, acceptable conditions of work and a decent standard of living for all workers — agricultural, industrial or otherwise. By the Forty-second Amendment provision has been made that the State should take steps by suitable legislation to secure the participation of workers in the management of undertakings, establishments and other organisations engaged in the field of industry. Under Article 39 it has also been indicated that the State should ensure equal pay for equal work both for men and women and provision should be made that the health and strength of workers, men and women and the tender age of children are not abused, and that citizens are not forced by economic necessity to enter avocations unsuited for their age or strength. The State has the obligation to make provision for securing just and humane conditions of work and

for maternity relief. Undoubtedly, in this field substantial achievements have been made during the post-independence era. Beginning from the Industrial Disputes Act, 1947, several beneficial labour legislations have come in and the implementation of the laws in this zone is appreciable. That is mainly on account of the fact that labour organisations have espoused the cause of the workers and the labour unions have emerged strong and powerful to espouse this cause. The judiciary has also played its own role. Many have a feeling that keeping in view India's economic condition and taking into consideration the fact that we are still considered to be a developing country, the protection and conditions which the workmen enjoy in India are either comparable or even better than what is available in many of the developed countries. Adequate research in most of these aspects has not been undertaken and, therefore, the material which is available on each of the items which the seminar will consider is meagre. Governmental agencies still continue to be the principal instrumentalities for undertaking the assessment of achievements. Until the common man becomes interested and socially activated groups come into the field, the progress will not be real.

There is a gradual but wider realisation now that the impact of actuality and the intensity of immediacy are wanting in our actions. Until government and the people develop a real concern for genuine work in the field nothing substantial can really be achieved. Time-bound targets should be set and regular assessments of every progress should be undertaken.

Unfortunately the idealism which prevailed when we became independent has been lost. The consciousness which had been generated when the fruit of the struggle for independence was about to materialise is no more found. In the post-independence era we have not been able to sustain the requisite element of patriotism. The famous saying that 'eternal vigilance is the price of liberty' has been forgotten after independence has been achieved and the country has taken a turn leading us away from what we were looking for at the end of the struggle for independence.

Indisputably law is a regulator of human conduct but it is difficult to achieve noticeable social reform through law. The voice of reason is more readily heard when it can persuade but

not coerce. Through education a regeneration can be brought about of the virtues which are being looked for today. The spirit of acceptance has to be created and that would be possible through a new mode of education through literature, the public media, debate and by organising seminars. There is throughout the world an acute crisis of confidence in integrity and fairness. That also has to be restored. Social activism is necessary to reorient the social institutions and press them into service of mankind.

Law should be a pledge that citizens will do justice to one another. If every citizen lives up to this expectation of law, social life would improve and become orderly. It is only in an orderly society that we can have security and prosperity which will lead to ultimate peace and happiness.

I am sure your deliberations will be useful and positive guidelines will emerge from the discussions which will follow and you will be able to contribute some solution to some of the living problems of the day on which you are going to debate. I wish your seminar success and reiterate my thankfulness to you for having invited me here this morning. May I now formally declare your Seminar as inaugurated?

VALEDICTORY ADDRESS

V. KHALID

Let me at the outset express my profound thanks to the organisers of this seminar for extending this invitation to me to deliver the valedictory address. I congratulate the Jammu University and the organisers of the Seminar for the excellent manner in which it has been got up. The Jammu University, and in particular its Department of Law, deserve praise for the manner in which the faculty of law is performing its functions. For the last three days you had a very lively, scintillating and illuminating intellectual exercise. I cannot illumine you further. I would like to share a few random thoughts with you.

India, the secular socialist republic of which we claim to be the proud citizens, is comprised mainly and predominantly of the downtrodden and the weaker sections. This section is in fact the third world within the third world. The vibrancy of our secular socialist republic depends upon the manner in which social justice is extended to the weaker section. Social justice to the weaker section should occupy the highest consideration of the State. The functional failure of the rule of law and the operational relevance of judicial justice depend on the deep concern for the downtrodden in our constitutional egalitarianism. We, the citizens of India, entered into a solemn pledge when the republic was born. This pledge is seen enshrined in the Preamble to the Constitution. This preambular pledge highlights the value revolution implicit in the transformation and the leap forward from slavery to the republican form of government. Justice, social and economic, equality of status and liberty, dignity of the individual and other radical humanist promises spelt out in the opening words of the supreme *lex*, the document on which rests the aspirations of the

* Judge, Supreme Court of India, formerly, Chief Justice, J & K High Court.

teeming millions of this country, have been clearly elaborated in the various articles of the Constitution.

The people of India were subjected to a feudal and imperialistic legal system before independence. With the advent of freedom this legal system and the concept behind it underwent a great change. India's *corpus juris*, while undergoing this change, became committed to the downtrodden and the weaker section. The Constitution of India is a social document and marks a radical departure from the traditional affection for the propertied class. The independence movement that ushered in freedom to the country cannot be characterised purely as a political movement. It had social and economic objectives also. This is seen reflected by the inclusion of the various articles in the Constitution that came in the wake of the freedom of the country, in which the socio-economic objectives find eloquent expression. The Constitution has taken care to include within its scope various safeguards for the advancement of the educational, social and economic interests of the weaker sections in the society, especially those who were denied even the elementary basic and fundamental rights till then. This concern for the weaker sections including women, scheduled castes and scheduled tribes was the cynosure of the constitutional outlook. Anti-social and exploitative conduct like untouchability, employment of children in risk occupations, forced labour and gender injustice, have been frowned upon by the founding fathers of our Constitution since they are allergic to the people of this country and, therefore, naturally allergic to the Constitution.

While considering the scope of the justice mechanism we have to bear in mind the distinction between the philosophy of law and the sociology of law. The mechanism of law in recent years has evolved in such a manner as to find out the needs of the society and to apply the legal system to such needs. The progress of society depends upon a proper application of law to its needs. The concept of justice has differed from age to age. The present day concept of justice is totally different from what it was a century ago. Today, society has come to realise its rights and its obligations. Law has to mould itself to deal with such rights and obligations. The object and purpose of a just legal order is

to bring about a synthesis between the requirement of social justice and the requirements of law. The test to determine whether law, in fact, subserves the good of the people is against the actual achievement and not in the mere existence of law. Mere existence of a legal system or of laws cannot solve the problems of the society. It is by the concrete benefit that the weaker section of the society achieves by the application of such legal system that its utility is tested. Society cannot remain static. It has never remained static. Society moves. Its problems also move. With the advent of civilization the horizons of societal needs have increased and expanded. If law does not keep pace with the expansion, the whole system will crumble, the void being filled up by force. This fear now appears to be out of place because our legal system appears to face the challenge successfully.

However, this challenge can be met only if there is a coordinated action by all concerned. Law takes its birth from the Law Makers. Its validity depends upon a vibrant law interpreting body. A happy harmonious blend of action between these two bodies is necessary to make the law potent. For an effective discharge of the functions of these two wings, the third wing should contribute its mite and that is the legal profession. The legal profession has a sacred duty to uphold the dignity of law and not exist for material gains only.

The upsurge of national consciousness has altered the outlook and the psychology of the citizen. He has now changed his status from a subject in a dependency to a citizen of a Democratic Republic, the Constitution of which has guaranteed to him large rights. He has now become proudly conscious of these rights. When his rights are threatened by executive action or otherwise he seeks resort to courts of law for his redress. The courts of law have to be alive to the new situation. They have to realise that law cannot operate in a vacuum. It has to reflect social attitude and behaviour. Courts of law have to keep in mind the social ethos in interpreting the laws and to see that their judgments reflect the common man's aspirations. The image of the judicial system will get seriously impaired if this objective is not kept in view. It is of the essence of our impartial judicial system that it inspires confidence in the weaker section of the society.

The efficacy of law and the relevance of a legal system become evident not by their mere existence but from what they achieve. Mere black letter law without efficacious implementation is but a paper tiger. Achievement is possible only when there is a fearless and impartial judicial mechanism. It is here that the judiciary becomes evident. Access to justice is a human right. The big question mark before us is to see whether the Indian court system has been true to its constitutional commitment and has risen to the occasion. It is some consolation that in the recent past the judicial system and courts of law have bestirred themselves to activism in furtherance of the needs of the weaker sections of the society. Courts have thought it necessary and proper to ignore their traditional conservatism and have activated themselves leaving aside procedural tangles to extend its arms of assistance and aid to the weaker sections. Remedial measures and reliefs are granted now by the highest court and also by High Courts on mere *letters* of grievances emanating from deserving quarters. The horizons of *locus standi* jurisdiction have been expanded deliberately by the Indian judiciary in a manner that would be the envy of many countries. It has informalised procedures and has sensitively assumed jurisdiction where the sufferer before it belongs to the weaker section. Remedial jurisprudence is rapidly encompassing the entire judicial system. The judiciary has awakened from its ivory tower of isolation and has become a friend to the lowliest and the lost.

The Supreme Court of India has by its various pronouncements expanded its confines when confronted with invasion of basic human and fundamental rights. It has given up the rigid posture of the past when the beneficiary by its interpretation is the weaker section. Articles 21 and 39 of the Constitution reflect a dynamic projection of the concept of freedom of life and liberty. The apex court has, by judicial interpretation of Article 21, revolutionised the concept of freedom of life and property. The benefits intended to be given to the weaker section contained in the various articles of the Constitution dealing with labour, women and children, have also received very sympathetic interpretation at the hands of the Supreme Court and the High Courts.

I will now take up for consideration and discussion the role of the Indian judicial system and the law mechanism so far as

their application to the weaker sections go. Among the priorities the first according to me is the great injustice and atrocities that are committed on the Indian womanhood in utter disregard to the guarantees of the Constitution and various other extant enactments. The Constitution of India has clearly kept in view equality between man and woman in all respects. Unfortunately this equality has not found fulfilment in many respects. Without entering into a detailed discussion about the ramifications of gender injustice, I shall here highlight only two great evils that have disturbed the conscience of all right thinking citizens in the country. One is the dowry system and the consequent tragedies that befall women and the other the inhuman attitude myriad unfortunate women are subjected to. Seminars and discussions have been held time and again. But the twin evils mentioned above have not only not been eradicated nor any positive effective steps taken to get rid of them, but such attacks have only increased. Such evils are spreading like cancer over the entire country. The Dowry Prohibition Act has been on the statute book for years now. It is a dead letter law never enforced and if enforced done so more in its breach than in its observance. The law has failed miserably in eradicating the evil of dowry. What is necessary is the upsurge of a consciousness amongst all to combat this evil and to ostracise all those who indulge in them. Law must be stringent, if necessary, in the most deterrent manner, to cleanse society of this great evil. The sentencing mechanism should be severe regardless of the concept of the reformatory theory so that it would instil real fear in the minds of the people against this evil. Courts of law must be mandated to enforce sentence jurisprudence with an iron hand.

Dowry deaths have become a daily feature now. No single day passes without the newspaper carrying reports about dowry deaths. In that part of the country from where I come, such cruelties do not take place, though in some small measure the evil of dowry system prevails. Daily newspapers carry very alarming reports about cruelties towards women which make the most cruel misdeeds elsewhere look respectable. Dowry deaths euphemistically called alleged suicidal attempts must be viewed in a manner equivalent to ghastly murders. It is an irony that law has not been hard enough in dealing with the culprits respon-

sible for such crimes against half of the population of the country. A complete reorientation of the law is absolutely necessary to rid the society of these twin evils. The salutary principles of criminal jurisprudence embodied in the doctrine of benefit of doubt and the never changing burden of proof on the prosecution should undergo a change in dealing with such persons. Though this may sound a violent departure from the accepted norms of criminal law this would become absolutely necessary if these evils are to be eradicated. Hard remedy is necessary when crimes are hard. Such a departure from the normal rule alone can infuse fear in the minds of erring individuals. The concern expressed by various organisations of women in the country and the righteous indignation shown by them in certain cases cannot be dismissed as something which does not merit attention at the hands of the powers that be, the legal profession and the judiciary. Recent amendments brought about in the criminal law cannot be said to go far enough. More stringent measures are necessary to put an end to the evils affecting women. It is necessary to establish a high power committee to go into the pros and cons of this highly reprehensible phenomenon to suggest effective solutions to bring solace to the helpless members of the weaker sex. My suggestion that reformatory theory of punishment should yield place to deterrent punishment in such spheres is intended to infuse fear and thus reduce at least the number of such crimes.

Allied to this injustice towards women is another evil, though lesser in magnitude, traffic in women. The root cause for this is economic and unless the economic conditions of women are strengthened and improved it may not be possible to eradicate this evil in full. The question whether the provisions of Suppression of Immoral Traffic in Women and Girls Act have met the constitutional requirements is a moot question. Article 23 of the Constitution deals with right against exploitation. Perhaps this Act was passed under Article 23 read with Article 35 to avoid exploitation in women. If this Act has fallen short of attaining its objectives, more stringent measures have to be adopted. The emphasis should be on preventing innocent girls falling into infamy and not to get rid of prostitution altogether.

Dealing with the provisions of this Act, in a case, when a

married lady with two children was brought before me, I had occasion to say thus in 1973 KLT 15, at page 19:

Being a matter of current interest I think it will not be out of place to express my views on the painful and harrowing tale that Santhamma unfolds in this case. She affords the best illustration of how a woman happily married with two children has been driven to sell herself for her sustenance and that of her children, thanks to the neglect by her husband. The pain of her husband's neglect perhaps rankles in her breast. She has to look after her children, feed them, educate them and clothe them. They are without paternal care. Hence, she had to choose between a life of penury, poverty and starvation on the one hand and the life of comparative ease on the other. She chose the latter and the price she had to pay was the mortgage of her chastity. To start with, she was perhaps lured into submission for easy money by some unscrupulous man. The dike once breached there was no return and today she has no qualms in declaring openly to the police that she lives in prostitution. Young divorcees, neglected wives and young widows fall easy prey to the advances made by their 'protectors'. I hope that the government and social reformers will strike at this source.

The whole-timers and the professionals may not readily agree to give up the gilded cage of their profession for the daily grind of a more respectable but arduous career. What should be attempted is to reform the part-timers, the drifters, the amateurs, and other unfortunate women who slip to infamy and disrepute by accidental circumstances.

Opinions are not uniform in this respect. There are those who point to the failure of the law to check this social evil that has existed since the dawn of civilisation. There are others who argue with Lecky who "speaks of prostitutes as safeguards of the sanctity of the home and of the innocence of our wives and daughters". There are yet others who argue with Bertrand Russell that "society therefore sets apart a certain class of women for the satisfaction of those masculine needs which it is ashamed to acknowledge yet afraid to leave wholly unsatisfied". Those who advocate for permissiveness and sexual liberation of women agree with Russell that "those who oppose the new freedom should face frankly the fact that they are in effect advocating the continuance of prostitution as the sole safety valve against the pressure of an impossibly rigid code." (*Marriage and Morals* by Bertrand Russell)

Permissive sex or sexual liberation of women is something foreign to the Indian concept of womanhood though there

are a sizeable few even in our country who hold the view that permissive sex does not breed prostitution, it reduces its incidence. Rehabilitation of the fallen women can only be through social reform. Social reform is impossible except through economic emancipation. The basic problem here, as in many other cases, is economic.

I still hold the view expressed by Bertrand Russell that it is only those unfortunate members of the weaker section who slip into infamy that have to be protected and not those who have turned professionals. It would be the duty of associations dealing with protection of women to take up the cause of the uninitiated unfortunate girls slipping into infamy before they get hardened as professionals.

I may in passing refer to the *Devadasi* system which is a scourge on Indian womanhood. Nothing has been done so far to rid this section of Indian womanhood composed mainly of *Harijans* of the life of infamy they fall in. It is heartening to note in this context the recent group marriages of the *Devadasis* from Bijapur. These girls are mostly *Harijans* dedicated to the service of Goddess Yellamma who vow not to marry but invariably find their way to selling flesh in Bombay and other important cities. Social organisations of women should direct their attention and activities towards these evils. It is at this root and at this stage that action is necessary to cleanse the society of the ignominy that Indian womanhood is made to suffer.

Article 14 of the Constitution of India confers equality before law. Article 15 enshrines the prohibition on the grounds of religion, caste, sex or place of birth. Article 16 mandates the State for equality of opportunity in matters of public employment. The question, in the context of these constitutional mandates, is whether these equalities are respected in letter and spirit and are in fact extended to the weaker sections including women who form one-half of this country's population. The executive, the legislature and the judiciary should not allow themselves to be exposed to the criticism of employing a misogynous posture in their outlook. It is necessary to protect women from invasion on their rights and even on their existence. All such methods as will ensure protection to them have to be resorted to. If it is necessary

that laws should be amended, let it be done without fear. Amendment of existing laws indicates progress. No law can stand static. Even the supreme law may need amendment.

To deny the right of amendment to those empowered in that behalf is to retard progress. If it is found that the present law is insufficient to improve the conditions of women, amend it and amend it properly. It is correctly said "blessed be the amending hand". Let no woman in this land die hereafter an unnatural death. Let the law be stiff, stiff even to the point of being ruthless to save women from such cruelties. If a woman is killed for dowry let there be a legal presumption that she was murdered. If a lady is alleged to have committed suicide in suspicious dowry circumstances let there again be a presumption that she was made to die because of torture. I feel constrained to say this in this harsh manner since the conscience of every Indian should be disturbed at the inhuman manner in which such tragedies are perpetrated day in and day out. We will never allow the image of the Indian culture to be tarnished in its dealing with women. We will reverse the maxim, "let not a single innocent man be punished though many really guilty escape" and instead say, "let not a single culprit in such cases escape". We are trained to frown upon the martyrdom of innocent persons at the altar of criminal cases. We will hereafter reconcile ourselves with the extermination of guilty persons in such cases though without the usual evidence and proof beyond reasonable doubt. Seminars and symposiums have so far failed in this behalf. The need of the hour is law that will bind the courts to punish the guilty.

The Constitution of India has taken care to protect the working class and has safeguarded its basic human rights. Article 17 of the Constitution does away with untouchability. The big question mark now before the nation is whether this sacred trust entrusted to the nation by this article has been respected fully or not. Can it be said with any amount of certainty that this evil has been totally obliterated from society? I have my own doubt in answering this question in the affirmative. Instances are not rare where a sizeable section of this country still suffers from the stigma of untouchability and instances are also not rare where members of such section are treated without respect and are

subjected to indignity. It is not by enforcement of statutory provisions alone that this evil can be eradicated. The conscience of every Indian citizen must be aroused against the vice of untouchability. Public opinion must assert itself against this and the law enforcing machinery must find ways and means harsh enough to punish those who even remotely think in terms of untouchability.

Article 23 of the Constitution deals with prohibition of traffic in human beings and forced labour and Article 24 with prohibition of employment of children in factories. Article 43-A enjoins participation of workers in management of industries. The founding fathers of the Constitution thought it necessary to include these articles to rid the Indian society of the malaise of bonded labour and child labour; later by the inclusion of Article 43-A in 1976, we wanted to raise the standard of the working class to that of the management to confer on them the right of participation in establishments they work. Article 43-A read with Article 39 occupies a special place in the constitutional scheme for the upliftment of the working class. The courts in India, the Supreme Court in particular, have been trying to uphold the dignity of the working class. I do not say confidently that labour in this country has achieved the dignified position that the Constitution had in contemplation. Bonded labour in its primitive form may not exist and may have disappeared. Perhaps pressure of public opinion and civic consciousness contributed to this happy position. Whether the strict mandate contained in Article 23 and the awareness of these mandates were responsible for this slight improvement will be open to doubt. Still bonded labour in other sophisticated forms bordering almost on slavery do exist in this country consisting predominantly of villages situated in remote areas. It may not be possible to identify and locate the exploited groups. Exploitation of labour and slavery are as old as civilisation. It might be said that they cannot be banished overnight by an executive fiat or constitutional directives. Still it is a sad commentary on the different organs of the powers that be that even after 35 years of independence there do exist in this country bonded labour in one form or the other. Courts of law in this country which are to be the sentinels of human freedom have to be extremely vigilant to see that no one in this country is denied his basic human right. It

is this realisation that has dissuaded the courts in India from following the traditional path of their adjudicatory functions limited to settlement of inter-party disputes and embarking upon other modes to extend their aid to subserve the constitutional rights to those who deserve them. Article 23 strikes at forced labour in whatever form it may manifest itself. Forced labour in whatever form is violation of human dignity and contrary to basic rights. Even if remuneration is paid, if labour supplied is not willing but is associated with force, it is hit by Article 23. Force in Article 23 is not only physical or legal force but force arising from the compulsion of economic circumstances which leaves no choice or alternative to a person in want and compulsion to provide labour of service for less than the wages due to him under law.

Cases have come to the notice of the Supreme Court and High Courts of forced labour in one form or the other and courts have taken upon themselves the duty to go to succour for all those who have been subjected to forced labour. It is only recently that the Supreme Court struck a blow in the Bandhua Mukthi Morcha case alleging bonded labour in a number of stone quarries near Faridabad in Haryana. The State Government was wholly and totally unaware of the bonded labour and went even to the extent of denying the existence of bonded labour. The Supreme Court was able to dig into the inhuman conditions in which these unfortunate quarry labours lived and worked. The Supreme Court in that case gave 21 directions to the Central and State Governments to ensure payment of minimum wages and to draw up a scheme to rehabilitate them within three months. The Gujarat High Court recently had occasion to consider the conditions of labour within the premises of the Indian Farmers Fertilisers Corporation Ltd., and went to the rescue of the labourers and gave directions to eliminate their sufferings and to bring their conditions of service in tune with the mandate of the Constitution.

Instances are not rare where children under the age of 14 are also subjected to labour, sometimes in highly dangerous explosives factories, in utter disregard to the constitutional protection contained in Article 24. The law enforcing machinery has not risen to the occasion even after 36 years of independence to help

free the unfortunate children under the age of 14 from forced labour. There are several match factories producing explosive materials which employ children. Though Articles 23 and 24 provide that contraventions of these articles would amount to offences punishable in accordance with law, I do not know whether any law has been passed under Article 35 making such contravention punishable.

One other statute, promulgated more in the interest of the downtrodden and the weaker section than the rich, is the Prevention of Food Adulteration Act. The provisions of this Act have also not been properly implemented. This is an irony. It is the downtrodden, poor and the weaker section who deserve protection from adulteration in their foodstuffs. History will bear it out and the judicial pronouncements will speak eloquently in agreement with me that the real culprits under the provisions of this Act have never been arrayed before the courts of law. The Supreme Court was incensed at this total indifference of the authorities in not implementing the letter of the law. In the actual working of the Act it is only the poor and the small trader that is caught in the web of this enactment. Never the rich and the big traders. In my experience extending over 12 years, I have come across only milk vendors and traders in small grocery shops as accused in these cases. That such petty traders alone should be the martyrs in enforcement of this Act is not a proposition that I can reconcile with. The minimum punishment for an offence under this Act is 6 months imprisonment and a fine of Rs. 1,000. It will be negation of justice to punish a poor breadwinner of the family who is found in possession of adulterated article of which he is completely ignorant, which reaches his hands changing hands through several traders starting with that fat and rich trader sitting elsewhere, to be sent to prison. I may cite the example of *kesari daal*. This article is an adulterated foodstuff not by adulteration by mixing it with any foreign article but which is an adulterated article by itself. I have known cases of small vendors in remote villages falling prey to the Food Inspectors and not those who supply this article. Extensive cultivation of *kesari daal* goes on in various parts of this country. Nothing has so far been done to check this cultivation. If this comes into the hands of poor persons, unknowingly and ignorantly, it is not justice to punish them. If

the authorities cannot strike at the root, it would be unjust to punish those in the lower rung. This complaint of mine will become clearer when we know that in Madhya Pradesh this adulterated foodstuff is given to the labourers as their wages. No other evidence is necessary to satisfy any right thinking man of the utter disregard of the provisions of this Act. These things take place under the very nose of the authorities and they cannot pretend ignorance of it. The law enforcing machinery have to get at the culprits and unless they are caught, the poor man in the villages will not get the benefit of this enactment either.

One of the reforms largely advocated for making justice available to the weaker section is the legal aid system. Article 39-A introduced in 1976 directs the States to provide free legal aid by suitable legislation of schemes or in any other way. It is regrettable that no statutory mechanism has yet been evolved to make the concept of legal aid effective. The old concept of the haves alone getting access to the court has to go. Ere long at least a situation should arise in this country where a person will not be bound to bring 'his own suit upon his own bottom and at his own expense'. A state of affairs must come into existence when persons with some means will be in a position to bring their cases at the expense of the State and conducted by lawyers of their own choice, without making any contribution out of their own pocket. This should not remain mere wishful thinking. It should take a concrete shape. I am happy to learn that a small beginning is afoot under the aegis of the University of Jammu, Faculty of Law and I wish this endeavour all success. The first Legal Aid Act was passed in England in 1949. Certain lacunae in this Act were noted and were remedied in 1964. A legal aid fund was constituted to meet the litigation. Necessary bodies were constituted to consider the reasonableness of the claims meriting legal aid. Legal aid was extended not only in civil cases but in criminal cases also. The need of the hour is the enactment of a law enjoining on the State a statutory obligation to extend legal aid to the needy and the poor. Law and the judicial system should evolve, as a consequence of such enactments, in aid of the downtrodden and the weaker sections keeping pace with the tryst with destiny India made when the nation awoke to freedom. Pandit Jawaharlal Nehru reminded the nation of this long years ago in the following words :

The service of India means the service of the millions who suffer. It means the ending of poverty and ignorance and disease and inequality of opportunity. The ambition of the greatest man of our generation has been to wipe every tear from every eye. That may be beyond us, but as long as there are tears and sufferings, so long our work will not be over.

Long years ago we made a tryst with destiny, and now the time comes when we shall redeem our pledge, not wholly or in full measure, but very substantially.

We must see that these burning words do not remain hackneyed quotes without disturbing our callous bosoms. We must avoid the periodical ride that the masses—poor and helpless—are taken through seminars and symposia turning their heads too long on their demands but do something positive to make the legal aid scheme a reality without getting lost in rhetoric alone.

Litigation is oftentimes a fight between unequals. The catch-word hereafter should be arbitrate not litigate. Till such time that litigation transforms itself into arbitration, the oppressed and needy party should be given aid by the State so that deserving and competent counsels will plead the cause of such needy persons. The most effective scheme to get rid of traditional litigation, in my view, would be the composition of Nyaya Panchayats and arbitrators with high integrity so that unnecessary expense can be avoided. The present day litigation which involves adherence to procedure and the Evidence Act have become a bane on litigation in this country. I firmly believe that unless the procedural law in this country is structurally altered, there is no hope for the future. Certain ripples are seen in some parts of the country to evolve a scheme of arbitration and avoid court litigation. Nyaya-laya in Maharashtra is a new experiment in taking the law closer to the poor by making reconciliation of civil dispute between the parties and taking the court only for regularisation. Judicial officers, members of the Bar and members of social organisations are playing an important role in the evolution of this system. This appears to be patterned after the Lok Adalat Movement in Gujarat which again is a form of conciliation and free service. I hope that this movement will spread and a great leap forward would take place for improving the lot of the needy amongst us.

Public interest litigation which has worked as a burgeoning branch of law, thanks to the heroic contribution by the Supreme Court, has to a large extent helped resolution of matters relating to basic human rights and other fundamental rights. The Supreme Court has with remarkable courage embarked upon areas which were denied to the courts by its judicial activism. Let us hope that this sort of activism will be channelised through the right direction and not used for imaginary and undeserving causes.

Our socialist republic with social justice as its basic tune will find its finest hour only when listless Indians can claim through law rights to life, liberty and the pursuit of happiness. This is the dynamics of the third world jurisprudence. Dr. Ambedkar warned, addressing the concluding stages of the Constituent Assembly, thirty years ago :

On the 26th January 1950, we are going to enter into a life of contradictions. In politics we will have equality and in social and economic life we will have inequality. In politics we will be enjoying the principle of one man one vote and one vote one value. In our social and economic life we shall by reason of our social and economic structure continue to deny the principle of one man one value. How long shall we continue to live this life of contradictions? How long shall we continue to deny equality in our social and economic life? If we continue to deny it for long we will do so only by putting our political democracy in peril. We must remove the contradiction at the earliest possible moment or else those who suffer from inequality will blow up the structure of political democracy which the Assembly has so laboriously built up.

Our country is 700 million strong. Our preponderant majority live in the villages. Justice at their doorsteps has to be a reality beyond hollow words. I hope that it would be possible in the years ahead for us to say that the Republic of India found law elitist, but made it humanist. To say with Henry Peter Brougham as follows :

It was the boast of Augustus that he found Rome of brick and left it of marble. But how much nobler will be the sovereign's boast when he shall have it to say that he found law dear and left it cheap; found it a sealed book and left it a living letter; found it the parsimony of the rich and

left it the inheritance of the poor; found it the two-edged sword of craft and oppression and left it the staff of honesty and the shield of innocence.

I wish that this seminar would catalyse the Bench and the Bar, the legislature and the executive, the academicians and the media in their duty by the people of India. We, the people of India, are both the masters and the beneficiaries of justice unlimited.

REPORTS OF THE SESSIONAL CHAIRPERSONS

First Session *Justice Between Generations* (11 February, 1984)

Chairperson—Prof. V. S. Rekhi

Co-Chairperson—Prof. G. P. Tripathi

Rapporteurs—1. Dr. M. P. Singh

2. Dr. R. K. Kotru

The session started with the summarisation of his paper by Prof. V. S. Rekhi. He referred to three paradigms—liberal, evolutionary and critical—on the issue of protective discrimination and concluded that courts had been following the liberal paradigm only. Dr. Errabi sought to establish a relationship between Articles 14, 15 and 16 on the one hand and Articles 38 and 46 on the other for the purpose of protective discrimination. His main argument was that Articles 15(2) and 16(2) should not come in the way of Articles 15(4) and 16(4) in the matter of protective discrimination on the ground of caste. He argued that under Article 14 reservation to the extent of 100% was permissible. Mr. K. K. Arora emphasised the fact that courts had failed to evolve a satisfactory criterion of classification. He opposed caste as a basis of backwardness, and pleaded for conducting evaluative studies for identifying backward classes on such factors as poverty, education, geographical location, etc. Mr. Vibhute who presented Prof. S. K. Agarwala's paper on Identification of Backward Classes supported Mandal Commission's recommendations regarding caste as a basis of classification along with other factors such as economic and educational backwardness. Mr. T. N. Shalla pleaded for re-examination of the reservation policy in view of its controversial implementation. Prof. Koteshwara Rao opined that economic factors need to be taken into account along with social and educational factors for determination of backwardness and suggested that backward classes which had availed of benefits and as a result improved their situation be excluded from the category of persons entitled for reservation. He in strong terms defended reservation policy and rejected the counter arguments based on merit or quality. Mr. Balraj Puri was of the view that

caste was the most convenient and practical criterion for determining backwardness. Mr. Iqbal Ishar suggested that reservations should be considered to be a compensation for past victimisation of certain classes, but cautioned against following reservation policy in the matter of promotion in jobs beyond the first level. Prof. Krishna Bahadur also supported the caste criterion, but subjected it to the limitation of income. Dr. B. B. Pande emphasised that caste in India constitutes class and reservations based on caste were sound in principle and needed to be continued. Dr. M. P. Singh suggested a distinction between reservation as a compensation for past victimisation and reservation as a policy of redistribution. Basically he rejected caste as a basis of classification except in the case of those who were backward due to past victimisation. Prof. P. G. Krishnan generally opposed indefinite continuation of reservations, but instead suggested that government take effective steps to provide primary education free of cost to backward classes and implement an aggressive programme of family planning. Dr. Menon referring to the paper of veteran schedule caste leader and former Mayor of Bombay, Dr. Borale, pointed out that our reservation policy had failed to benefit the persons for whom it had been made and also led to violence. Dr. K. L. Bhatia suggested a contradiction between the idea of the secular State and Articles 14 and 15(4).

Prof. Rekhi summed up the debate of the afternoon session of 11 February, 1984 as under :

1. There is a pressing need to evaluate empirically the impact of reservation policy and the mechanisms of its implementation.

2. Caste is not a good basis for classification. Perhaps a victim perspective could be substituted.

Second Session *Equal Justice for All* (12 February, 1984)

Chairperson—Prof. N. R. Madhava Menon

Co-Chairperson—Prof. S. G. Singh

Rapporteurs—1. Shri B. B. Pande

2. Shri Nisar Ahmad Ganai

In his introductory remarks Prof. Menon emphasised on one of the important objectives of the seminar, namely, to ensure

access to justice and in order to provide equal justice it was imperative to find ways and means of giving legal aid to the needy. In the context of socio-economic conditions prevailing in India, legal aid had multi-dimensional perspectives which included legal awareness, assertiveness, access to information, legal representation in judicial proceedings, new interpretative techniques to help the poor, social mobilisation for legal action, imaginative and effective judicial remedies and follow-up action in appropriate cases. He invited suggestions from the participants on these points. Prof. Chhabra regretted that in most States in India precious little had been done to create appropriate structures and dependable procedures for providing legal aid and advice. Even in those States in which facility had been introduced the intended beneficiaries did not utilize it for a variety of reasons. He favoured granting of legal aid in cases other than sessions cases as well. Mr. Jaswal emphasised the importance of right to counsel of one's choice with reference to Article 22(1) of the Constitution and Section 303 of the Criminal Procedure Code. He concluded that denial of counsel of one's choice would amount to inequality. Prof. Tripathi gave a graphic account of the machinery of legal aid in the State of Madhya Pradesh. He suggested measures for improving the quality of legal aid and stressed on rendition of preventive legal aid. Mr. S. K. Sharma referred to the plight of prisoners in various States. According to him there was great scope for legal aid organisations to work in prisons. He wanted prison manuals to be updated and setting up of prison courts and ombudsman in every prison. Prof. Krishna Bahadur canvassed for provision of legal aid for all and ridiculed prescription of eligibility standards on economic grounds. Dr. Bhatia made the suggestion that the Central Govt. should enact legislation on legal aid so that there are common standards for the rendition of legal aid throughout the country. Prof. Oommen warned that legal aid was not the exclusive remedy for social ills. He pointed out that law was an ideological instrument as a diversionary therapy for the masses. He would prefer to have legal aid adopted as a programme and a part of social obligation. Prof. Koteswara Rao thought that until social control of professional service was established legal aid would not be possible in the realistic sense. He commended the

Czechoslovakian model as the appropriate one for India. Prof. Rekhi analysing the working of the legal aid programme in Madhya Pradesh concluded that weaker sections in that State appear to get more legal advice and less of litigational aid in comparison to higher income groups. Dr. Errabbi was of the view that under Article 21 of the Constitution the State could not be compelled to provide a lawyer of one's choice. He added that legal aid would be classified into litigative and non-litigative legal aid. While the lawyer was essential in the former it was not so in the case of non-litigative situation. Dr. Saraf pointed out that the Central Legal Aid machinery must ensure that administrative structures for rendition of legal aid were set up in all parts of the country as soon as possible. He thought that the problems of poor were complex and only a fraction of them were legal problems. One of the important services to be rendered to the poor was the identification of the nature of problems and referrals to appropriate agencies for ameliorative action.

Concluding the deliberations Prof. Menon invited attention of the participants to the preventive aspects of legal aid and the emerging strategies of class justice. In this regard he suggested that public interest litigation deserved careful consideration. He also appreciated the role of voluntary agencies and social action groups in bringing justice within the reach of the poor.

Third Session *Protection of Women* (12 February, 1984)

Chairperson—Prof. Krishna Bahadur

Co-Chairperson—Prof. P. Koteswara Rao

Rapporteurs—1. Dr. B. Errabbi

2. Shri B. P. S. Sehgal

The chairperson identified the main themes on the basis of papers presented by the participants as under :

1. The philosophy and analysis of the rights and duties of women with respect to property, marriage, adoption and divorce.
2. Atrocities against women and the reaction and response of police towards such atrocities.
3. The special problems of Muslim women in contemporary India with reference to marriage, divorce, maintenance and inheritance.

4. Role of women in population control.

The papers on the subject were discussed according to the scheme outlined above.

Professor Krishna Bahadur was of the opinion that institutional divorce had come to stay. He pleaded for liberalisation of divorce and suggested the deletion of the provisions relating to restitution of conjugal rights and judicial separation. He also felt that divorce cases be disposed of within six months. Professor Oommen dealt mainly with women in the work force. He saw legal vacuum in many areas where women of the work force were involved and advocated for enactment of special laws with special procedural mechanisms to deal with the problems of women. Mrs. Rekha Chowdhari expressed her anguish on the continuing inequality of women in economic and social matters and pleaded that attempts be made to understand and appreciate the root causes of malady which brought about slavish dependence of women on men in several respects. Dr. Vidya Bhushan reviewed the progress made in the J & K State to ameliorate the condition of women. He concluded that in spite of many meaningful steps taken by the State women were inferior to men in many respects.

Papers which dealt with atrocities against women engaged considerable attention of the participants of the seminar. Mr. Shyam Singh who dealt with the offence of rape revealed that although there was overall increase in the rate of crime, convictions for rape were correspondingly few and far between. He pleaded that in ordinary course evidence tendered by the prosecutrix should be relied upon without corroboration except when the probability factor was totally missing. Dr. Sudesh Sharma suggested that dowry offences be cognizable and non-bailable, marriages be compulsorily registered and the person convicted for the offence of dowry be disqualified for holding public post for three years from the date of conviction. Prof. Virendra Kumar's paper also highlighted the theme of dowry and critically examined the implications of the recommendations of the Joint Select Committee on the subject. Dr. Kotru presented the conclusions of his empirical studies on the attitude of women towards police which clearly indicated that women had developed distrust of the police.

Three papers concerned social status of Muslim women and their rights. Mrs. Lalita Parihar discussing important Supreme Court decisions came to the conclusion that divorced Muslim woman's right to get maintenance is absolute and is not affected by the amount she received either during the period of coverture or at the time of divorce. She stressed the need for uniform Civil Code for all in India. Mr. N. A. Ganai who has conducted empirical studies in the State of J & K regarding rights of inheritance of Muslims of J & K State disclosed that Muslim women in the State were deprived of the benefits which are available in other parts of the country to Muslim women on the basis of *Shariat* and to Hindu women on the basis of Hindu Succession Act, 1956. He pleaded that the outworn customs which regulate the rights of inheritance of Muslim women in the State be abrogated. Mr. K. K. Arora was of the view that polygamy among Muslims did not have Quranic sanction. He pleaded for cautious approach in enacting legislation on the subject with the consent of the Muslim community.

Population control and its importance in ameliorating the conditions of women were the theme of three papers. Prof. S. G. Singh suggested that law could play an effective role in population control. It could be used at the levels of procreation process and social relationship. According to him woman is not a free agent at present in her decision to go for family planning. Mr. Sehgal suggested raising further the marriageable age of women, amending Child Marriages Restraint Act and other laws in order to make the marriage made in contravention of the law as void. Mr. Kapoor discussed the problems of abortion and stressed that no impediments should be created in the way of abortion at any time.

The chairperson summed up the points made by the several participants. The following conclusions were generally agreed upon :

1. There is a need to set up family courts.
2. Divorce should be liberalised and cases of divorce should be decided by the courts within a stipulated time.

3. Dowry offences be made cognizable and non-bailable.
4. Special steps be taken to prevent atrocities towards women.
5. Administration of welfare laws pertaining to women should be monitored in order to ensure their effective implementation.
6. There is need for Uniform Civil Code.

Fourth Session *Protection of Children* (12 February, 1984)

Chairperson—Prof. K. S. Chhabra

Co-Chairperson—Shri Balraj Puri

Rapporteurs—1. Dr. S. C. Srivastava

2. Shri Shyam Singh

The fourth session was devoted to beggary prevention laws and protection of children in general. Dr. Pande on the basis of his extensive studies on the subject highlighted the inadequacies in beggary laws and their faulty administration. He pleaded far-reaching reforms such as redefining the offence, extending legal services facilities free of cost in the Beggar's Court, increasing existing institutional facilities and imparting meaningful training to unfortunate children who are found begging. The point whether beggars have a constitutional right to carry on this profession was inconclusively debated. It was felt that in the absence of social security system beggar children should not be punished for the act of begging. Miss Ved Kumari discussed questions relating to social policy of the Children Act. She concluded that the Children Act, 1960 though a progressive legislation was deficient in several respects and suggested that greater attention be paid to its implementation. Mrs. Usha Razdan expressed her anguish on the manner in which juvenile children were treated in this country. She suggested that cases of all juvenile children should be exclusively disposed of by juvenile courts. Every effort should be made to create congenial and favourable atmosphere within the juvenile court with the help of social workers, probation officers, psychologists and psychoanalysts. Mr. Subash Raina on the basis of his own studies revealed that the Probation of Offenders Act, 1968 and Children Acts were not being effectively implemented. He dwelt upon benefits which could be availed of by offenders under the probation laws such as

their segregation from hardened criminals. However, he was unhappy with the quality of probation officers attached to the juvenile courts.

The chairperson summed up the broad conclusions as under :

1. There was a need for effectively implementing Children Acts uniformly in all the States.
2. Juvenile courts had failed to give effect to the basic philosophy behind the establishment of such courts.
3. There was need for correctional approach in rehabilitating delinquents.
4. The courts should increasingly rely upon Probation of Offenders Act and Children Act in disposing cases of delinquent children.

Fifth Session

Protection of Labour

(13 February, 1984)

Chairperson—Prof. P. G. Krishnan

Co-Chairperson—Prof. P. Koteswara Rao

Rapporteurs—1. Dr. A. N. Sadhu

2. Mrs. Lalita Parihar

The chairperson in his opening remarks analysed the points raised by the participants in their papers and classified them as under :

- (a) Bonded Labour and Child Labour
- (b) Workmen's Compensation Laws and their implementation
- (c) Agricultural Labour.

Prof. Krishnan's paper gave a graphic account of the dimensions of the problems of child and bonded labour. He thought that the present system of protection could only perpetuate the evils inherent in the system. The statutory protections had been beneficial only to the organised section of the working population. He forcefully pleaded for a comprehensive and integrated system of social security, framing of an industrial code containing minimum standards of health, safety and welfare, and to have a fresh look at the manner in which laws were being implemented. Dr. Bhatia in his paper discussed the plight of accident victims

who in his opinion did not get enough due to ignorance of the victims and manipulations of factory owners. His empirical studies of workers in J & K State and Punjab clearly revealed the need for monitoring the administration of workmen's compensation laws in several states. Mr. Panda examined the problems of bonded labour in a semi-feudal and a semi-capitalist society. According to him the legislative measures could at best remove the symptoms but not the disease. Protection of labour was possible only through the labourers themselves. His discussion on two models of exploitation, viz., the feudal model and the Mahajan (the moneylender) model, was instructive. He made a strong plea for rationalisation of labour in areas where it was required at fair wages. Dr. A.N. Sadhu and Dr. Amarjeet Singh in their paper highlighted the social and economic aspects of child labour. They pointed out that there was a vicious circle of child labour leading to unemployment of adults and other evils of great magnitude. There was a great need to reformulate the social policy and take effective measures to eradicate them. Dr. Srivastava critically examined the role of law in preventing the exploitation of child labour. In the context of Indian social and economic conditions he thought that child labour could not be abolished. Consequently, there was need of protecting the children from exploitation in employment. For this purpose it was imperative to identify hazardous and non-hazardous employment so that no child was allowed to take up hazardous employment. There was a need for strengthening penal provisions so that deterrent punishment was given to those who deprived a child of his statutory entitlements. Mr. Matta who had conducted a study of child labour in carpet weaving centres of Kashmir referred to the plight of child labour in this particular industry. The laws were only on the books and the child due to economic compulsions was forced into this servitude. He suggested that people should be educated on the evils of child labour; laws meant to protect labour should be implemented strictly and inspection machinery be strengthened. Dr. M. P. Singh brought out the importance of constitutional imperatives regarding child labour. He suggested that the State should take the problems with a sense of urgency and on the basis of reality. Professor Oommen discussed the problems of agricultural labour. He commended the Kerala model for the protection

of this class of workers and suggested that it could become the national model.

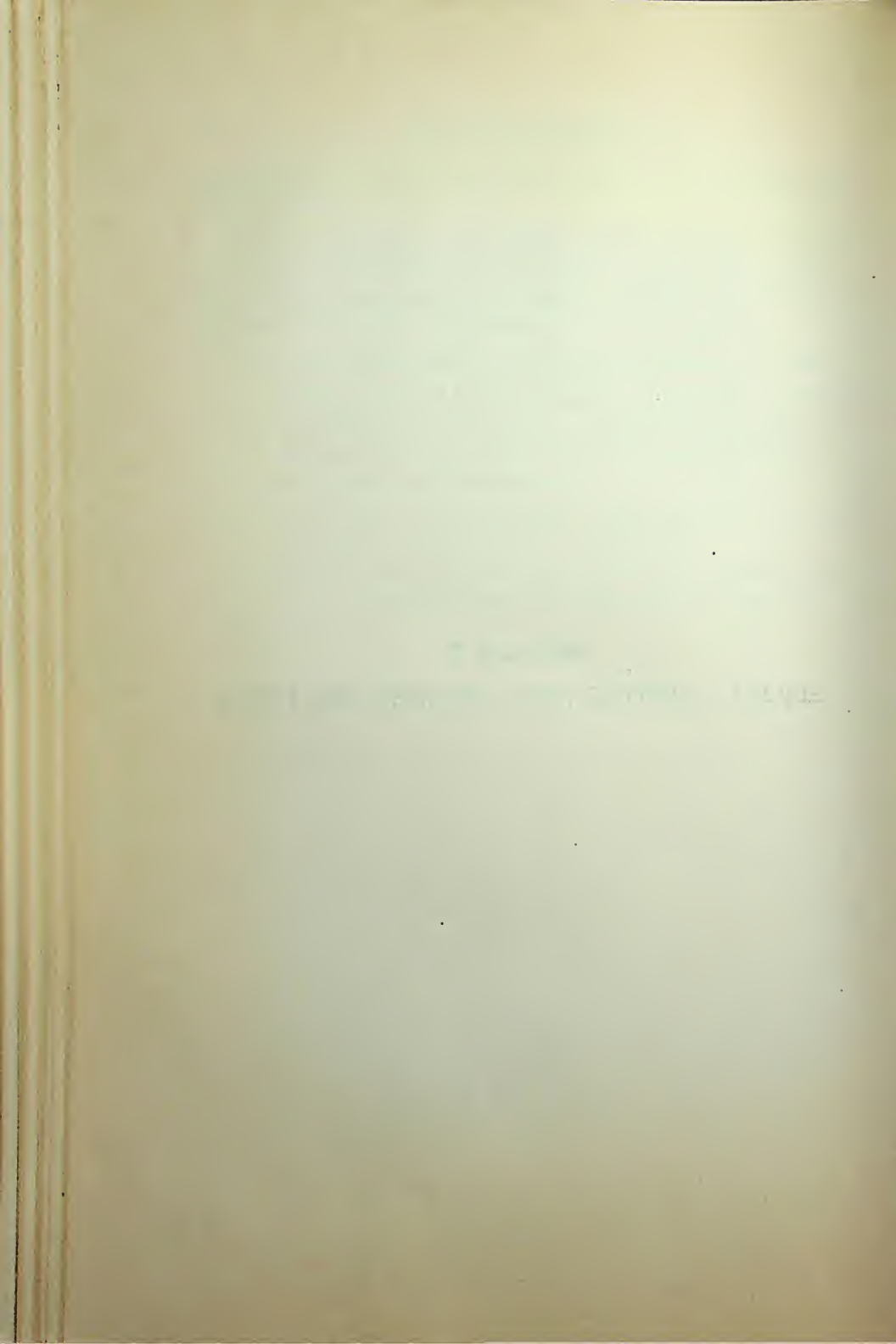
Others who participated in the discussions were Prof. Rekhi, Mr. Panda, Mr. Jaswal, Mr. Mushraf Ali and Mr. Iqbal Singh. The discussions centered on issues such as education for children, skill creation and labour legislation.

The chairperson broadly summed up the conclusions as under :

1. In the context of Indian conditions child labour cannot be abolished. Nevertheless, there was enough scope for effectively ensuring enforcement of laws meant for protection of this class of society.
2. Child labour was not merely a legal problem. It was essentially a social and economic problem.
3. Bonded labour was a disgrace on the fair name of this country and all steps must be taken to put an end to it.

SECTION 2

EQUAL JUSTICE FOR WEAKER SECTIONS



IDENTIFICATION OF BACKWARD CLASSES: LAW AND SOCIAL POLICY

(With special reference to Mandal Commission Report, 1980)

S. K. AGRAWALA

Without entering into the semantics of the expression 'vulnerable', it may be stated that sections of the society that are susceptible to exploitation, oppression, harassment, discrimination and even violence, from the dominant groups, may safely be called 'vulnerables'. In a country wherein more than 40 per cent of the population exists below the poverty line, these 40 per cent abject poor may themselves be said to constitute a class of vulnerables. But in this paper the reference is to the vulnerability because of their status as women, children, religious minorities, members of scheduled castes, scheduled tribes or other backward classes—a status essentially imposed by birth, over which they have no control. This vulnerability is certainly accentuated by poverty.

This paper deals with the 'other backward classes' (OBCs) only amongst those vulnerables and attempts to evaluate the role of law in their welfare. Recently the report of the (Second) Backward Classes Commission (1980) set up by the Government of India has become available. It is a comprehensive report dealing with 'other backward classes' (as distinguished from 'Scheduled Castes' and 'Scheduled Tribes'). The Report forms the focus of this study.

The Constitution specifically provides for their protective discrimination by the State. These provisions on the one hand have to be seen as a charter of 'equality and social and economic

* M.A., LL.M. (Lko.); LL.M. (Harvard); LL.D. (Lko.). Vice-chancellor, Agra University, formerly Professor and Head, Post-Graduate Department of Law, Poona University, Poona.

justice' for these classes, and on the other hand as an important cause of mounting social tensions. The State (including the judiciary) has to perform a conjurer's trick in balancing the interests of these classes vis-a-vis the rest of the society. The interpretation and application of these constitutional provisions regarding the identification of backward classes constitutes the main focus of this paper, in the context of which the report has been evaluated.

The Criteria for Identification

Article 15(4) uses the expression 'socially and educationally backward classes of citizens' and Article 16(4) speaks of 'backward class of citizens'¹ only. But the Constitution neither enumerates the classes of citizens who are backward nor lays down the criteria for determining backwardness. However, Article 340 envisages the setting up of a commission to investigate the conditions of socially and educationally backward classes and the difficulties under which they labour and to suggest remedial measures. The First Backward Classes Commission was set up in 1953 which submitted its report in 1955. Its terms of reference, *inter alia*, included the determination of the criteria for identifying OBCs. (socially and educationally backward classes other than Scheduled Castes and Tribes), and the preparation of lists of such classes according to this criteria. However, the Report was not unanimous on the determination of criteria, though the majority had recommended caste as the basis, but the Chairman had debunked it. The Central Government did not accept the recommendations² for the reasons, *inter alia*, that the recognition of specified castes as backward may serve to maintain and even perpetuate the

-
1. Article 15(4): "Nothing in this article or in clause (2) of Article 29 shall prevent the State from making any special provision for the advancement of any socially and educationally backward classes of citizens or for the Scheduled Castes and the Scheduled Tribes."

Article 16(4): "Nothing in this article shall prevent the State from making any provision for the reservation of appointments or posts in favour of any backward class of citizens which, in the opinion of the State, is not adequately represented in services under the State."

2. For the gist of the Memorandum of the Government of India on the First Commission's Report see the *Report of the Backward Classes Commission* (1980 Government of India), First Part, pp. 1-2 (hereinafter cited as *Report: 1980*). The First Commission's Report was not discussed by the Parliament.

caste system by the recognition of a large number of castes and communities³ as backward, the really needy would be swamped by the multitude. Subsequent efforts by the Central Government did not succeed in throwing up a suitable criteria. The Central Government took the decision not to draw up lists⁴ of backward classes, nor to make any reservations in Central Government services for backward classes other than S.C. and S. T. However, it advised the State Governments to apply 'economic tests than to go by caste'.⁵

3. The Commission had identified 2399 communities, out of which 930 alone accounted for 11.5 crores of population. Scheduled Castes and Tribes made up another 7 crores (on the basis of 1951 Census). Thus about three-fourths of India's population would have been backward.

See the comments of the (Second) Backward Classes Commission (1980) regarding methodological flaws and internal contradictions in preparation of the above lists by the First Commission. See *Report*: 1980, First Part, pp. 2-3.

4. In the communication sent by the Central Government to State Governments on August 14, 1961 regarding the preparation of lists of OBC, it was observed that even if the Central Government were to specify lists of OBC under Article 338(3), it will still be open to every State Government to draw up its own lists for the purposes of Articles 15 and 16. "As, therefore, the State Governments may adhere to their own lists, any all-India List drawn up by the Central Government would have no practical utility." (emphasis supplied) Cf. *Report*: 1980, pp. 2-3.

This statement, it is submitted, raises a very pertinent question. By strict interpretation, whereas under Articles 341 and 342 respectively, the lists of S.C. and S.T. drawn up by the President would be conclusive and binding on State Governments, the language of Article 338(3) would not admit of making the lists of OBC specified by the President binding on the States. If that be so, the Central Government effort (on the basis of the Commission's Report) in preparing the lists of OBC will serve a very limited purpose, i.e. for reservations etc. in Central Government services and educational institutions only. What is, however, necessary is that in order to have a national outlook and approach to bear on the problem and to ensure the application of a uniform criteria throughout the country the lists of OBC issued under the authority of the President are as binding on States as the S.C. and S.T. lists. Only then can petty considerations of electoral gains or the attempts of chance majorities in State legislatures to benefit their caste groups be eliminated.

See S.K. Agrawala: "Protective Discrimination and Backward Classes in India" in *Minorities and the Law*, (1972), Indian Law Institute Publication, pp. 199, 201.

The suggestion made by one scholar that the Centre could legislate on the subject under its residuary power under entry 97 of List I of the Seventh Schedule of the Constitution merits consideration. To this writer it seems that such a law would be perfectly valid because the subject is not covered by any item in list I or II or III.

5. The Second Commission has decidedly not been in favour of giving primacy to the economic test. It has observed, ".....in giving primacy to 'economic tests' in determining the type of backwardness referred to in

(contd. on next page)

Thus the identification of backward classes had been left to the States. Ten State Governments have subsequently set up fifteen commissions and committees in this behalf. (Eight other States and Union Territories have notified lists of OBC for grant of preferences). They have adopted different criteria of backwardness, several of which have been subjected to judicial review. These judicial verdicts have thrown up several guidelines for the identification of backward classes.

The demand for determining as to 'who the OBCs are' was made several times in the Parliament. This clamour ultimately led to the appointment of the (Second) Backward Classes Commission by the Janata Government in December 1978. The Commission submitted its report to the President in December, 1980.

The Second Commission has proceeded on the definite premise that in the traditional Indian society social backwardness was a direct consequence of caste status and that various other types of backwardness flowed directly from this crippling handicap.⁶ Though caste restrictions have lessened considerably as a result of rule of law introduced by the British, urbanisation, industrialisation, spread of mass education and, above all, the introduction of adult franchise after independence, but all these changes, observes the Commission, mark only shift of emphasis and not any material alteration in the basic structure of caste.

It is also true that importance of casteism in Indian politics is on the increase. But this writer could not agree more with Rajni Kothari when he observes. "Those in India who complain of casteism in politics are really looking for a sort of politics which has no basis in society." Politics is a game of furthering one's interests through group associations. Caste provides the ready-made nucleus for such a group, more so when the privileges in

(contd. from previous page)

Article 340(1) of the Constitution, the Government has, perhaps inadvertently, paid less than adequate attention to the constitutional requirements in this matter. It may be possible to make out a very plausible case for not accepting caste as a criteria for defining 'social and educational backwardness'. But the substitution of caste by economic tests will amount to ignoring the genesis of social backwardness in the Indian society." (emphasis supplied) See *Report*: 1980, p. 4, Para 1.21.

6. *Report*: 1980, First Part, p. 17.

the Indian society are traditionally distributed according to caste ranking of persons.

It bears repetition to what this writer had commented a decade back :

When the correlation between caste and backwardness (whether social, educational or occupation) is so obvious in the Indian society through generations of pollution of the caste system, it would be unrealistic to disregard caste as the main criterion of backwardness on the specious plea that this would perpetuate caste system rather than eliminate it...⁷

The Second Commission has also observed :

The pace of social mobility is no doubt increasing and some traditional features of the caste system have inevitably weakened. But what caste has lost on the ritual front, it has more than gained on the political front.⁸

It is the backwardness of certain classes⁹ generated because of 'historical reasons' whose elimination has been the concern of the founding fathers.¹⁰ The effort has been to remove the vestiges of past social injustices. It is not any other type of backwardness identified by 'secular or rational' criteria to which the constitutional provisions relate. Further, even if the criteria of occupation, poverty, place of residence or any other which may be said to be secular and rational, are applied, they ultimately lead to the same caste groups. Debunking the observation that 'social backwardness is the result of poverty to a large extent', the Second Commission has, it is submitted very rightly, observed :¹¹

The poverty of these castes stemmed from their social

7. S.K. Agrawala, *op. cit.*, p. 203.

8. Report : 1980, First Part, p. 20.

9. The Experts Panel set up by the Second Commission also recognised that the main task before the Commission was to "lay down the criteria for identifying recognisable and persistent collectives and not individuals". It observed, "in the Indian context such collectives can be castes or other hereditary groups...." (Report : 1980, p. 54).

"In fact, caste being the basic unit of social organisation of Hindu society, castes are the only readily and clearly recognisable and persistent collectives." *Ibid.*

10. See speeches of Nehru and Ambedkar at the time of the introduction of the Constitution (First Amendment) Bill in Parliament in 1950. *Parliamentary Debates*, Vol. 12-13 (Part II), at cols. 9616 and 9006.

11. Report : 1980, First Part, p. 30, para 7.44.

discrimination and they did not become socially backward because of their poverty.

If classes refer to "homogeneous section of people grouped together because of certain likeness of common traits and identifiable by some common attributes such as status, rank, occupation, residence in a locality, race, religion and the like",¹² it needs to be questioned if economic criteria alone can lead to the identification of such 'classes'.

It is only when the economic opportunities of OBCs improve substantially and their disabilities are appreciably eliminated that it could be thought of giving up the criteria of caste (based on ideas of pollution, ritual and purity) altogether for identifying backward classes. Purely secular and rational criteria like poverty, education etc. could then be applied. The real question then would be if protective discrimination in case of OBC or even in case of S. C. and S. T. be continued at all.

This writer also does not subscribe to the thesis¹³ that classification under Article 15(4) should not be based on any constitutionally prohibited grounds like caste, religion, race, sex or place of birth. It is often forgotten that the key word in Articles 15(1) and 29(2) is 'only'. There should, therefore, be no objection to base the classification of backwardness on caste taken along with other relevant factors, howsoever the relationship between Article 15(1) and 15(4) is interpreted.

It also bears mention that the concept of backwardness is not intended to be 'relative'. This is the observation made by the Supreme Court itself in the well-known *Balaji* case.¹⁴ Can a criteria, not based on historical facts but, based on secular and rational factors, lead to anything else other than relative backwardness?

It was suggested by this writer that taking caste groups as the basis, other variables like annual family income, education upto

12. *P. Sagar v. State of Andhra Pradesh*, AIR 1968 SC 1379.

13. See P. K. Tripathi : *Some Insights into Fundamental Rights* (1972 University of Bombay), pp. 203-205; Mohammad Ghouse : *Constitutional Law—I*, XI ASIL 249, 266-67; *Subash Chandra Tandon v. State of U.P.*, (1975) 1 SCC 267, 273.

14. *M. R. Balaji v. State of Mysore*, AIR 1963 SC 649.

a particular class among boys of school going age, employment in government service and occupational distribution etc. could be applied according to a weighted formula to each caste group, and backward classes identified accordingly. "Only such or an analogous approach could give objectivity to the determination of backwardness..."¹⁵

It is heartening to note that the Second Commission has done just such an exercise in evolving the criteria for backwardness. It has been the most comprehensive enquiry to date in India for preparing a firm and dependable data base¹⁶ for its report. A countrywide socio-educational survey covering 405 out of 407 districts was conducted. Voluminous data gathered from the survey was computerised and 31 primary tables¹⁷ were generated from this data in respect of each State and Union Territory. On the basis of these tables, 11 indicators¹⁸ or criteria for social and

15. S. K. Agrawala, *op. cit.*, p. 204.

16. *Report*: 1980, First Part, p. 61.

This writer is not competent to comment on the methodology employed by the Commission, but from the Report it appears that all possible precautions were taken to ensure both the reliability of the data and veracity of the conclusions drawn from the data. The best available talent was also harnessed for the purpose. See Chapters III & XI of the main Report. *Report*: 1980, First Part, pp. 12-13, 50-53.

However, the Report observes: "... This survey has no pretensions to being a piece of academic research. It has been conducted by the administrative machinery of the government and used as a rough and ready tool for evolving a set of simple criteria for identifying social and educational backwardness..." (p. 53).

17. See *Report*: 1980, First Part, Appendix XXI of Vol. II for the description of tables.

18. The Indicators were:

A. Social

- (i) Castes/Classes considered as socially backward by others.
- (ii) Castes /Classes which mainly depend on manual labour for their livelihood.
- (iii) Castes/Classes where at least 25% females and 10% males above the State average get married at an age below 17 years in rural areas and at least 10% females and 5% males do so in urban areas.
- (iv) Castes/Classes where participation of females in work is at least 25% above the State average.

B. Educational

- (v) Castes/Classes with number of children in the age group of 5-15 years who never attended school is at least 25% above the State average.

(*contd. on next page*)

educational backwardness were derived and they were grouped under 3 broad heads, i.e. Social, Educational and Economic. In view of their relative importance 3 points were assigned to each one of the social indicators, 2 to educational indicators and 1 to economic indicators. This added up to a total score of 22 points. All these 11 indicators were applied to each one of the *castes* covered by the survey in each State. Castes obtaining a minimum score of 11 points on this score were listed as socially and educationally backward.

As the socio-educational survey covered only 2 villages and one urban block per district, a large number of castes were left out. Moreover, in some cases, the size of the sample was so small that the results were not dependable. In view of this two supplementary approaches were adopted. First, State-wise list of the 11 groups of primitive tribes, exterior castes, criminal tribes etc. contained in the Registrar General of India's compilation of 1961 were culled and included in the OBCs. The social and educational backwardness of these castes and communities was more or less akin to S. C. and S. T. Secondly, based on the public evidence and personal knowledge of the Commission members, State-wise lists of OBCs were drawn up which were not covered by the survey.

Some of the well-known OBCs included in the State lists were not ranked as backward in the survey. Such aberrations were corrected in the light of the other field evidence available with the Commission.

(*contd. from previous page*)

- (vi) Castes/Classes where the rate of student dropouts in the age group of 5-15 years is at least 25% above the State average.
- (vii) Castes/Classes amongst whom the proportion of matriculates is at least 25% below the State average.
- C. *Economic*
- (viii) Castes/Classes where the average value of family assets is at least 25% below the State average.
- (ix) Castes/Classes where the number of families living in *kuccha* houses is at least 25% above the State average.
- (x) Castes/Classes where the source of drinking water is beyond half a kilometer for more than 25% of the households.
- (xi) Castes/Classes where the number of households having taken consumption loan is at least 25% above the State average.

One might comment that these supplementary approaches are not fully scientific. However, this is perhaps unavoidable in any sociological survey based on statistical methods. The Report, however, does not mention as to which and how many castes and communities were added through the application of these supplementary approaches.

The set of eleven indicators being caste-based could not be applied to non-Hindu communities. In view of this, a separate set of 3 criteria was evolved for the identification of non-Hindu OBCs. According to this criteria non-Hindu OBCs comprise: (i) all untouchables converted to any non-Hindu religion, and (ii) such occupational communities which are known by the name of their traditional hereditary occupation and whose Hindu counterparts have been included in the list of Hindu OBCs. The Report does not indicate as to who in the lists are non-Hindu OBCs.

In 31 States and Union Territories, the total number of castes and communities in the State-wise lists works out to 3743. (No OBCs have been listed in Nagaland and Lakshadweep.) The total population of OBCs is estimated at 52% of the total population.¹⁹ This is in addition to the population of S.C. and S.T. which amounts to 22.56%.

How far does the Report satisfy the norms evolved by the Courts as regards the criteria of 'backwardness'

As observed earlier the criteria of backwardness evolved by several States were subjected to judicial review. The pronouncements of the courts have been subjected to detailed scrutiny by scholars. The Second Commission has also done that exercise on the basis of a comprehensive paper prepared by the Indian Law Institute, New Delhi, for the Commission.²⁰ The Commis-

19. Since figures relating to caste-wise population after 1931 are not available, the percentages have been worked out on the basis of the 1931 Census data assuming that the *inter-se* growth of population over various castes, communities and religious groups has been in the same proportion as the 1931 Census data indicated.

The Commission had recommended that caste enumeration ought to be carried out at the time of the 1981 Census itself to facilitate the work of the Commission, but this was not done. The Commission has called for the reconsideration of this policy. [Report: 1980, p. (iv)].

20. See Report: 1980, First Part, pp. 24-30. For Indian Law Institute study, see Volume III of Report: 1980.

mission relied on the Allahabad High Court judgment in *Chotelal v. State of U. P.*,²¹ for the gist of important case law²² on Articles 15(4) and 16(4). It is reproduced below :

- (i) The bracketing of socially and educationally backward classes with the Scheduled Castes and Tribes in Article 15(4) and the provision of Article 338(3) that the references to Scheduled Castes and Tribes were to be construed as including such backward classes as the President may by order specify on receipt of the Report of the Commission appointed under Article 340(1), showed that in the matter of their backwardness they were comparable to Scheduled Castes and Scheduled Tribes.
- (ii) The concept of backward classes is not relative in the sense that any class which was backward in relation to most advanced class in the community must be included in it.
- (iii) The backwardness must be both social and educational and not either social or educational.
- (iv) Article 15(4) refers to 'backward classes' and not 'backward castes'; indeed the test of caste would break down as regards several communities which have no caste.
- (v) Caste is a relevant factor in determining social backwardness but is not the sole or dominant test.

21. AIR 1979 All 135.

22. Important case law

M. R. Balaji v. State of Mysore, AIR 1963 SC 649; *Chitrallekha v. State of Mysore*, AIR 1964 SC 1823 (it was observed in this case that backwardness could be determined even without reference to caste on the basis of other relevant criteria); *P. Rajendran v. State of Madras*, AIR 1968 SC 1012; *A. Periakaruppan v. State of Tamil Nadu*, (1971) 1 SCC 38; AIR 1971 SC 2303; *State of A.P. v. Sagar*, AIR 1969 SC 1379; *Triloki Nath v. State of J & K*, AIR 1969 SC 1; *Janaki Prasad v. State of J & K*, (1973) 1 SCC 420; AIR 1973 SC 930 (in this case a criteria based on education was propounded); *Subhash Chandra Tandon v. State of U.P.*, (1975) 1 SCC 267, 273-74 (the court held that a constitutionally prohibited ground like caste, race or religion should not be treated as a criteria of backwardness); *K. S. Jayasree v. State of Kerala*, (1976) 3 SCC 730; *State of U.P. v. Pradip Tandon*, (1975) 1 SCC 267; *State of A.P. v. U.S.V. Balaram*, (1972) 1 SCC 660; AIR 1972 SC 1375; *General Manager, S. R. v. Rangachari*, AIR 1962 SC 36; *T. Devadasan v. Union of India*, AIR 1964 SC 179; *State of Kerala v. N. M. Thomas*, (1976) 2 SCC 310.

- (vi) Social backwardness is in the ultimate analysis the result of poverty to a very large extent. Social backwardness which results from poverty is likely to be aggravated by considerations of caste to which the poor citizens may belong, but that only shows the relevance of both caste and poverty in determining the backwardness of citizens.
- (vii) A classification based only on caste without regard to other relevant factors is not permissible under Article 15(4) ; some castes are, however, as a whole socially and educationally backward.
- (viii) The occupations followed by certain classes (which are looked upon as inferior) may contribute to social backwardness ; and so may be habitation of people, for, in a sense, the problem of social backwardness is the problem of rural India.
- (ix) The division of backward classes into backward and most backward classes is in substance a division of population into the most advanced and the rest, the rest being divided into backward and most backward classes and this is not warranted by Article 15(4).
- (x) Article 16(4) does not confer any right on a person to require that a reservation should be made. It confers a discretionary power on the State to make such a reservation if in its opinion a backward class of citizens is not adequately represented in the services of the State. Mere inadequacy of representation of a caste or class in the services is, however, not sufficient to attract Article 16(4) unless that class (including a caste as a whole) is also socially and educationally backward.
- (xi) The object of reservation would be defeated if on the inclusion of a class in a list of backward classes, the class is treated as backward for all times to come. Hence the State should keep under constant periodical review the list of backward classes and the quantum of the reservation of seats for the classes determined to be backward at a point of time.

The Second Commission has made bold to observe that '... the judgment in *Balaji's* case and more so in that of *Chitralekha* represents, perhaps, the most conservative view on the relevance of caste for determining social backwardness and synonymity between classes and castes'²³. It has instead relied on *Rajendran, Sagar, Periakaruppan, Balaram* which show a marked shift from the earlier judgments and lay down that caste is also a class of citizens and if the caste as a whole is socially and educationally backward, reservation can be made in favour of such a caste. If the list is specified by castes it does not necessarily mean that caste was the sole consideration and that persons belonging to these castes are also not a class of socially and educationally backward citizens.

For the Commission, castes were no doubt the starting point; but social, educational and economic indicators weighted according to their relative importance ($12+6+4=22$ points) were applied to each caste; and a caste scoring 50% of the points and above only was listed as socially and educationally backward. Thus the classification is not based on caste alone.

The supplementary approaches (e.g., public evidence and personal knowledge) adopted for the inclusion of castes and communities not covered by the survey, may also be said to be covered by the dicta of the Supreme Court in *Balaram* case.²⁴

However, the most common argument that classification according to caste will create a vested interest in the perpetuation of the caste system has really not been met by the Commission, except its observation that in the Indian context backward 'classes' could only be identified through 'castes'. In the present submission we cannot wish away the caste system by not recognising its existence and its hold on the social fabric. An existing fact must be recognised.

23. Report: 1980, p. 26.

24. (1972) 1 SCC 660: AIR 1972 SC 1375. In that case commenting on the use of personal knowledge for characterising a particular group as backward by the Backward Classes Commission set up by the State of Andhra Pradesh, the Supreme Court observed:

That, in the circumstances of the case, is inevitable and there is nothing improper or illegal. The very object of the Commission in touring various areas and visiting the huts and habitations of people is to find out their actual living condition.

The Commission mentions in its Report (p. 54, para 12.8) that use of personal knowledge is approved by the above dicta.

However, the classifications based on caste and social privileges attached to backward amongst them are intended to be temporary measures only; if purposefully applied, there is bound to be a gradual and progressive elimination of such classifications and of the privileges attached to them. In the ultimate analysis, however, it is our commitment to social and economic equality which really matters. One cannot eat the cake and have it too.

The Commission has also met the objection that for non-Hindu communities, their religions being based on egalitarian outlook which do not recognise caste differentiations, caste could not be the criteria for identifying backward classes. The Commission applied other criteria in their case as mentioned above. It bears comment that this classification based on their previous untouchability before conversion and on occupations is on historical and hereditary grounds. However, the converts shall not enjoy the benefits available to Scheduled Castes; they will only enjoy the lesser benefits available to OBC.

The Commission has also complied with the holding of the court in *Balaji* that sub-classification between backward and more backward classes was violative of Article 15(4)²⁵, inasmuch as it has prepared only one list of OBCs. However, in his lone dissent to the Report one of the members Sri L.R. Naik has recommended that the list of OBCs should be split into two parts. The most deprived and underprivileged sections of OBC have been designated by him as 'Depressed Backward Classes'. Sri Naik felt that clubbing these two categories will not result in equitable distribution of benefits to these two groups. The Commission did not agree with it,²⁶ though it saw the point of Sri Naik's contention because of the aforesaid observation of the Supreme Court.

At another place²⁷ the Commission observes that it is true that

25. AIR 1963 SC 649.

The Supreme Court observed: "In introducing two categories of backward classes what the impugned order, in substance, purports to do is to devise measures for all the classes of citizens who are less advanced compared to the most advanced classes in the State, and that, in our opinion, is not the scope of Article 15(4)."

26. Report: 1980, First Part, p. (iv).

27. *Ibid.*, p. 57.

major benefits of reservation etc. will be cornered by the more advanced sections of the backward communities. But it questions:

Is not this a universal phenomenon? All reformist remedies have to contend with a slow recovery along the hierarchial gradient; there are no quantum jumps in social reform. Moreover, human nature being what it is, a new class ultimately does emerge even in classless societies. The chief merit of reservation is not that it will introduce egalitarianism amongst OBCs when the rest of the Indian society is seized by all sorts of inequalities. But reservation shall certainly erode the hold of higher castes on the services and enable OBCs in general to have a sense of participation in running the affairs of their country.

In the present submission²⁸, if the State benefits can flow to the lowest amongst the OBCs only if they are earmarked for them (so that they may not be appropriated by the dominant communities), it is imperative that the division of backward classes into backward and depressed must be made. It is common knowledge that if S.C. and S.T. were not treated as two separate categories, S.T. would have got no benefits at all. The same is the rationale for separating the S.C. from OBC. True that backwardness is not relative and Articles 15(4) and 16(4) are meant for the 'really backward', can it really be denied that in a listing of more than 200 caste groups in a State, some may be more depressed than the others. Further, the 'Depressed Backward Classes' have been picked up from the lists of OBCs prepared by the majority of the commission, they could not therefore have resulted in adding to the total percentage of people identified as backward by the Commission. In the present submission the issue is so vital that the Commission should have recommended the obtaining of advisory opinion of the Supreme Court on the point by the government.

The Bombay High Court had upheld²⁹ transference of reserved seats from one sub-group to the other (e.g., from S. C. to S. T. or to OBC) if the requisite number of candidates were not available in any sub-group, provided that the total percentage of seats did

28. See S. K. Agrawala, *op. cit.*, pp. 215-217.

29. *S. G. Pandit v. State*, AIR 1972 Bom 243.

not exceed the total reserved quota. But the Mysore High Court³⁰ had struck it down on the ground that the classification of different categories was based on different indicia and classification of OBC might vary from time to time and with reference to the nature of their backwardness. However, in the case before the court the reservation for the sub-group (OBC) after the allotment of additional seats had gone beyond the percentage reserved for OBC. The judgment is mute on the point as to what would have happened if the reservation for the sub-group had not exceeded its allotted quota even after the transference of certain seats to it. In the present submission, the basis of the Mysore High Court judgment is unconvincing. The indicia for classification of S.C. and S.T. and OBC are really not different, and the classification of OBC does not really vary so frequently. The transference of vacancies at least ensures seats for the other sub-groups, and if the total reserved quota is not exceeded, the chances of others are not affected.

The Commission has made no recommendation on the point. In the present submission this *inter se* transference should be made a specific part of the scheme of protective discrimination.

The Commission recommends that this scheme of reservations should be made applicable to all recruitments to public sector undertakings, Central and State, nationalised banks, private sector undertakings receiving State financial assistance, all universities and affiliated colleges. These recommendations need all out support. But for the private sector undertakings, reservations in recruitment in governmental and semi-governmental institutions under the Central Government and some State Governments is already in operation, in some form or the other. It needs to be put on a sound basis as recommended by the Commission. Reservation in private sector undertaking, if accepted, is going to mean a big gain to the OBCs.

Relaxation in the upper age limit for direct recruitments for OBCs as in case of S.C. and S.T. has also been recommended.

30. *S. A. Partha v. State of Mysore*, AIR 1961 Mys 220.

See also the earlier judgment in *B. S. Kesava Iyengar v. State of Mysore*, AIR 1956 Mys 20.

The courts have also upheld a geographical criteria for determining backwardness in a number of cases. Permanent residents of Ladakh district³¹, people in hill and Uttarkhand areas of U.P.³² were held to constitute a socially and educationally backward class. The Commission, however, has not given any consideration to geographical criteria in the identification of OBCs.

The geographical criteria obviously is more prone to over-inclusion than any other criteria. In the present submission the geographical criteria too should have been included for the identification of OBCs. The difficulties in the identification of backward areas throughout the country are, however, too many. That might have led the Commission not to attempt it. It is a moot question, however, if the courts would give effect to such a classification even after comprehensive lists of OBCs are issued under the authority of the President as per the recommendations of the Commission.

Other reservations for children of freedom fighters, defence personnel, persons of Indian origin domiciled abroad and the like are also made by the States. But it has rightly been held³³ that they do not constitute OBCs; the validity of such reservations ought to be judged under Article 14; and the *Balaji* limit of 50 per cent shall not apply to them. However, too many reservations, howsoever made, reduce the number of vacancies available for the general pool. Such other reservations must be cut down to the minimum.

The lists of OBCs prepared by the Commission too are open to the charge of over-inclusion. Such families in these castes whose income is above a particular minimum are certainly on the road to progress. Their disabilities tend to tell less and less on them with the improvement of their financial status. The upward mobility of the caste group as a whole is a dilatory process, but that of individual families among them is quite common. The caste-cum-poverty criteria for identifying backward classes has also been

31. *Sardool Singh v. Medical College*, AIR 1970 J & K 45.

32. *State of U.P. v. Pradip Tandon*, (1975) 1 SCC 267.

33. *Subashini v. State*, AIR 1966 Mys 40.

upheld by the courts.³⁴ In the present submission, the Commission should have qualified the availability of benefits to the members of OBCs identified by it by the family income criteria. This is also necessary for ensuring that all the benefits are not pocketed by the upper crust in a class as well as for an equitable operation of the scheme of benefits.

It is true that the determination of both 'income' and 'family' in individual cases is an exercise fraught with so many difficulties. But working out of objective guidelines, though difficult, is not impossible. Ultimately one may have to depend upon the certification of junior functionaries in the districts and verification may in most cases be impossible. Penal consequences must, therefore, be attached to false certification.

There is great merit in the suggestion made by one scholar that income limit cannot be the same for all types of benefits. It may have to be much higher for higher technical/professional training (e.g., medical or engineering) or for superior jobs than for general education up to higher secondary level or so, or for inferior non-technical jobs. It is rational to expect that candidates from the higher income groups only amongst the OBCs will be competing for higher jobs or for higher technical training. Two income limits may, therefore, have to be considered.

The compensatory discrimination provisions were meant to be merely enabling provisions, they do not confer any fundamental right to privileges. And the courts had consistently emphasized that Articles 15(4) and 16(4) are an exception to Articles 15(1) and 16(1) respectively. However, in *State of Kerala v. N.M. Thomas*³⁵, the majority held that article 16(4) is not an exception to Article 16(1). It is only an emphatic way of putting the extent to which equality of opportunity could be carried, viz., even up to the point of making reservations. It is a moot point if this holding could be used for claiming that it gives a right to a citizen to require that reservations should be made. It would be a very

34. *K. S. Jayasree v. State of Kerala*, (1976) 3 SCC 730.

35. (1976) 2 SCC 310.

significant development indeed if protective discrimination could be converted into a right. Since the *Thomas* case does not specifically overrule *Rajendran*³⁶ and other decisions, the better view would be that Article 16(4) does not confer such a right on a person, the view on which the Second Commission has proceeded.

The courts have only reviewed the criteria applied for identifying backward classes as also the extent of reservation. They have not gone into the lists prepared by the States, an exercise which could open up Pandora's box. If protective discrimination is made a right, the courts would hardly be able to escape the obligation to review the lists as well. It would depend upon how *Thomas* is interpreted and applied in subsequent cases.

The commission has recommended the review of the entire scheme after a period of twenty years, the span of one generation, as the raising of social consciousness is a generational progress. Thus the Commission has not moved on the premise that a class once included as backward is to be treated as such for all times to come. What happens then would largely depend upon the political will at that time. To establish its *bona fides* and its commitment to create an egalitarian society, the then Government must prune the lists after the application of scientific indicators.

36. AIR 1968 SC 1012.

ON OPERATIONALISING BACKWARDNESS

V. S. REKHI

The principal problem in affirmative action is that of determining the target group of the benefit-package. Those who are designated as the beneficiaries become entitled to certain advantages and positions and in that sense get an edge over others not similarly designated. In an open market situation *a priori* every person has a theoretically equal chance to compete for any advantage or position. The access to opportunities is open to all or all are located at the same base line. To choose some for strategic advantage is to handicap others and hence the resentment of those who are not targeted for affirmative action. The resentment may take either a negative form disclaiming preferential treatment as inimical to equality of opportunity, or a positive form of claims to be included in the target groups. Often it has both the dimensions commingled together as an emphasis on the attributes that the target group shares with the non-target group (poverty, lack of opportunities, suppression, *et al.*) and as a de-emphasis on the value of the benefits to the society as a whole (dilution of meritocracy, loss of morale, increase of corruption).

The constitutional mandate for affirmative action designates the target groups as backward classes. Some of these it identifies as Scheduled Castes and Scheduled Tribes and others it leaves innominate. The rationale for this distinction is largely historical.¹ The Scheduled Castes and Tribes were identified as such by a Schedule in the Government of India Act, 1935 and as such were parts of our political heritage. In addition the Executive was given the power to add to or delete from the list.² This target group was also given distinct advantages in matters of political participation and services. But this did not exhaust the target group. A broad remainder was designated as 'backward classes' and the content of this group was left to be determined.

* Professor and Dean, Faculty of Law, Aligarh Muslim University, Aligarh.

1. Government of India Act, 1935.

2. Articles 15(4), 16(4), 340.

The paper seeks to identify three competing paradigms of affirmative action and assess the attempts at operationalising backwardness in their light.

I

Liberal Paradigm

The liberal model of affirmative action is Aristotelian in conception. Its basic premise is that opportunity must follow talent but it recognizes that 'talent' itself is a product of social setting so that comparisons could only be fairly made among persons coming from the same strata of society. Equality can only prevail among equals. Those who have been denied adequate developmental opportunities because of constraints of the social order need be given compensatory aids.³ Rawls has conceptualized the liberal paradigm in the following words:

In the system of natural liberty the initial distribution is regulated by the arrangements implicit in the conception of careers open to talents in which positions are open to those able and willing to strive for them. These arrangements presuppose a background of equal liberty and free market economy. They require a formal equality of opportunity in that all have at least the same legal rights of access to all advantaged social positions. But since there is no effort to preserve an equality or similarity of social conditions, except in so far as this is necessary to preserve the requisite background institutions, the initial distribution of assets for any period of time is strongly influenced by natural and social contingencies. The existing distribution of income and wealth, say, is the cumulative effect of prior distribution of natural assets — that is, natural talents and abilities — as these have been developed or left unrealized, and their use favoured or disfavoured overtime by social circumstances and such chance contingencies as accident and good fortune. The liberal interpretation . . . tries to correct for this by addition to requirement of careers open to talents the further condition of the principle of fair equality of opportunity. The thought here is that positions are to be not only open in a formal sense but that all should have a fair chance to attain them . . . Assuming that there is a distribution of natural assests, those who are at the same level of talent and ability and have the same willingness to use them, should have the same prospects of success regardless of their initial place in the social system. . .

3. *Ibid.*

The liberal interpretation . . . seeks . . . to mitigate the influence of social contingencies and natural fortune on distributive shares.⁴

The liberal model of fair equal opportunity has the following basic postulates :

1. The distribution of opportunities depends on the merit of the competitors.
2. Merit is an acquired characteristic.
3. Acquisition of merit is culture-specific and is determined or at least conditioned by social contingencies.
4. Social contingencies over a period of time produce differentials of material conditions of life which affect acquisition of merit.
5. The opportunity distribution system must take into account the differentials created in acquisition of merit by social contingencies over a period of time.
6. Fairness of distribution lies in providing an equal opportunity relative to the differentials created by social contingencies.

II

Evolutionary Paradigm

Another model of affirmative action is disclosed by the history of preferential treatment in India. The opportunities have followed the distribution of political power. Preferential treatment has resulted from increasing political awareness and participation. Tracing the history of reservation the Kalekar Commission observed⁵:

Alarmed at the growth of political consciousness in the country, the British Government tried to weaken the rationalistic forces by offering representation to the minority communities in government services. Thus reservation of a certain percentage of appointments in favour of minority communities and groups like the Muslims, Christians, Sikhs and the Scheduled Castes was accepted and given effect to. When

4. Rawls, J. : *Theory of Justice*, p. 73 ff.

5. 1 Backward Classes Commission 24.

it was discovered that their candidates were unable to compete successfully in the open competitive examinations, a system was introduced of nominating a certain quota of the number recruited in open competition in order to ensure their representation.

The British followed a deliberate policy of disintegration. In order to debilitate the independence movement that was being led by the middle class, the British patronised the depressed classes and advocated a communal basis for participation under the Montague-Chelmsford scheme for constitutional reforms, recommending granting franchise to the backward classes by communal electorate. The Instrument of Instructions enjoined the Governments of Provinces 'to take care that due provision shall be made for the advancement and social welfare of those classes, amongst the people committed to your charge, who, whether on account of their smallness of their number or their lack of educational or material advantage or from any other cause, specially rely upon our protection and cannot as yet fully rely for their welfare upon joint political action'.⁶

The Round Table Conferences, the Communal Award and the Poona Pact resulted in reservation of seats for depressed classes in the legislature permitting limited but definite participation in the political process which is partly preserved in the Constitution.

Ambedkar was the architect of the ideas on political rights and privileges for the depressed classes. Commenting on the result of this venture E. Zelliott observed:⁷

In addition to the vital element of self-respect which Ambedkar engendered among untouchables, his vision of progress through education and politics, rather than the Gandhian vision of a change of heart among caste Hindus, has come to inspire most Scheduled Caste leaders. However, these leaders and their followers are rarely united beyond their own regions. In general, they support the dominant party of the area.

A study of the political advancement of Nadars in Madras would reveal the same trend. In 1828, the Governor of Madras

6. Government of India Act, 1935.

7. E. Zelliott: *The Untouchables*, p. 94.

intervened to let Nadar women cover their tops but as Nadars advanced economically they organised a caste association and in the twenties and thirties they backed the Justice Party as against the Congress. Later, they changed saddles and supported the Congress. The efforts of the caste association has made 'representative democracy' meaningful and effective⁸ in case of *Nadars*.

Similarly, *Vanniars* through their caste association obtained greater participation and share leading Rudolf to remark that though 'they have not voted solidly for any one political party they have benefited from their general political participation'.⁹ The *Iravas* in Kerala obtained both political clout and reservations through their association. Hardgrave has summed up the process tersely :

"As caste solidarity has increased, caste has been politicised and drawn into the political system as a major actor".¹⁰

At the instance of the Mandal Commission, Mr. Hebour of the Tata Institute of Social Sciences undertook a comparative study of affirmative action in north and south India. The study is revealing. In Tamil Nadu, the Brahmins had virtual monopoly of learning and government jobs. The proposed Montague-Chelmsford reforms led to the organisation of Justice Party by the non-Brahmin elite castes. This party introduced the communal reservation scheme that lasted till 1954. In that year the communal G.O. had to be revised throwing the forward non-Brahmin groups in the open pool but by that time they had consolidated their political power and penetrated the services adequately to feel secure of their share. Among the remaining backward classes for whom reservation was made, 11.7% of the classes captured 37.3% of the non-gazetted and 42% of the gazetted posts. The remaining 88.3% of the backward classes have not been able to reap much benefit and the pleadings of the Chairman of the Backward Classes Commission on their behalf was not even given a decent hearing.

8. Rudolf and Rudolf: *Modernity of Tradition*, p. 340.

9. Rudolf, L.I.: "*Modernity of Tradition: Democratic Incarnation of Caste in India*", 59 *Am Pol Sc Review* 975, 984.

10. Hardgrave, R.L.: "*Caste in Kerala*", 16 *Economic Weekly* 1841.

In Karnataka, prior to 1881, the Madras Brahmins dominated. In 1881 the Prince was given charge and the Mysore Brahmins raised the cry of Mysore for Mysoreans resulting in their victory in the opening years of this century. Then their monopoly was challenged in turn by the Lingayats and Vokkaligas who constituted the landed gentry. The organised caste associations and their claims found sympathetic ears around the Prince resulting in communal reservations. In the post-independence period, and particularly after the reorganisation of States, political power passed in the hands of Lingayats. These new leaders found it expedient to extend the communal reservations to the entire State and cover all persons except Brahmins. The political dominance of Lingayats and Vokkaligas led to resentment among non-Lingayats and non-Vokkaligas and Devraj Urs cashed in upon it to cultivate these communities.

In Bihar, the Kayasthas, Bhumihars, Rajputs and Brahmins dominated the pre-independence political scene. The attempts of Yadavs, Keoris and Kurmis to organise a Triveni Sabha and contest elections on the pattern of Justice Party failed miserably. The backward classes could only be organized politically in the sixties by Ram Manohar Lohia resulting in their capturing 31.6% seats in the legislature. In 1951 a government order had identified 79 more backward and 30 backward castes. The list has gone up to 93 and 128 respectively under the recommendations of the Mungerilal Commission in 1977.

In Uttar Pradesh the share of forward classes in the legislature fell from 5% to 2% and while no reservation scheme was proposed for sections other than Scheduled Castes and Tribes, in 1977 the Yadav Government identified 54 Hindu and 23 Muslim caste groups as backward for purposes of reservations.

These case studies bring to the fore the effect of political participation on distribution of opportunities. The greater the share of an organised caste group in political power the more would be the stringency and propriety of its claim to reservations.

The evolutionary retrospect of affirmative action discloses great affinity between affirmative action and the political rise of a group. The former appears to follow as a consequence of the

latter. It sounds cynical yet correct to say that as communities find their share of political power they seek to consolidate their rising position by affirmative action techniques which raise their potential of access to opportunities.

III

Critical Paradigm

A third paradigm of affirmative action focusses on its function. Affirmative action can be visualised as a programme to bourgeoisify a sufficient number of depressed classes in order to transform them into active, visible legitimators of the underlying and basically unchanged social structures. The goal of such action is to offer credible measure of tangible progress without in any way disturbing the basic class structure.¹¹

Affirmative action runs the risk of being caught up in the process of improving the lot of small number of middle class depressed classes while simultaneously reducing vast number of lower class people to a long term under class status. Dubey and Murdia have concluded that the relatively better-off sections among the backward classes have taken the most advantage of the programmes and the more backward sections have virtually remained where they were if they have not actually deteriorated.¹²

The collective strategy incorporated in the constitutional provisions reinforces the caste structures and legitimises the continued fractionalisation of Indian society in terms of congeries of persons. Social scientists have perceived the distinctive character of social stratification in terms of caste. D'Souza observes¹³:

The term stratification, as used by social scientists, implies that the society is divided into different hierarchical strata. But the status order can be of two different ideal types. The first type may be represented by a continuum in which the individuals may be arranged in a hierarchy of prestige or status and the continuum may be divided into

-
11. Freeman, Alan D.: "Anti-discrimination Law: A Critical Review", in the *Politics of Law* (ed. Kairys), pp. 96, 110.
 12. Dubey, S.N. and Murdia, R.: *Administration of Policy and Programmes for Backward Classes in India*, p. 25.
 13. D'Souza, V.S.: *Inequality and its Perpetuation*.

different categories in an arbitrary fashion, so that members in each category are of nearly equal status and the different categories form a status hierarchy. In the second type, the members of similar status are clustered in a corporate group and the different groups form a status hierarchy in the Indian caste system.

The collectivity orientation in caste group is akin to primordial group-centeredness which is a cause of alienation of groups from one another. This orientation has been noticed to prevent mobilization of the people in opposite economic camps. Namboodiripad says: 'Caste identity and solidarity of people have an independent reality which has come down from their tribal existence from the past and they are not just epi-phenomena of the material forces of production.'¹⁴

The same conclusion is reached by the critics of sanskritization who have found that the much advertised process results in a mere change of positions rather than structural change.¹⁵

Affirmative action, therefore, has the consequence of not eradicating the evil of casteism but of reinforcing it and putting a premium on it. The upward movement of a few of the depressed classes does not break the caste barriers. It legitimises the existing social structure and its caste demarcations by *ex facie* meeting the criticism that caste acts as a damper on economic development. The individual gets more opportunities by reinforcing his caste loyalties than by rescinding them.

Moreover, affirmative action preserves the myth of equality of opportunity, and through it serves as a major rationalization of class domination. Central to the notion of equality of opportunity is the internalized experience of poor as a personal failure. The affirmative action reinforces the meritocratic ideology by assuring that such of the depressed who had merit get a fair deal. The mythical nature of such an approach is obvious from the low numbers of persons who take advantage of such reservations and more so by the fact that the better-off come out at the top. Out

14. Namboodiripad, E.M.: "Caste Conflicts to Growing Unity of Popular Democratic Forces", 14 *Economic and Political Weekly*, 329, 330.

15. Dumarvt, L.: *Homohierarchichus*, p. 81.

of 11,74,020 class I jobs under the Central Government, 5.68% are held by Scheduled Castes and Tribes and 4.68% are held by backward classes. Out of 91,29,25 class II jobs, 18.18% are held by Scheduled Castes and Tribes and 10.63% by backward classes. Out of 4,84,687 class III and IV jobs, 24% are held by Scheduled Castes and Tribes and 18.98% are held by backward classes.

IV

From Kalelkar to Mandal via Havannur

1. **The First Backward Classes Commission**

The road to identification of the target groups has been a particularly tortuous one. The Central Government appointed the First Backward Classes Commission under the chairmanship of Kaka Kalelkar. The terms of reference required the Commission to lay down the criteria to be adopted in determining whether any section of the people may be treated as socially and educationally backward and to prepare a list of such classes.

The Commission *a priori* assumed that the Indian society was built on the medieval ideas of caste and social hierarchy and those notions still dominated the daily life of the people in the villages. They further assumed that social backwardness largely contributed to educational backwardness. The conclusion of the Commission by probing the criterion could only be found by probing deeper into the genesis of caste distinctions. The Commission observed :¹⁶

Those enjoying a higher social status with influence and power over other social groups and enjoying wealth or means to educate themselves, those occupying positions of power and authority in government service and trade, commerce and industry and those who employ a large section of people under them should all be classed as advanced. On the other hand landowners of uneconomic holdings, agricultural and landless labourers, cattle and sheep breeders, petty traders, meansless artisans and others engaged in unremunerative occupations, barbers, washermen, communities engaged in domestic and menial services and those who eke out a precarious living

16. 1 Report of the Backward Classes Commission 45.

by hunting and fortune telling should be brought under the category of backward classes.

The Commission concluded that the communities, classes, social groups who occupy inferior social position in relation to the upper caste and who answer the above-quoted description naturally constitute the backward classes.

The Commission in fact did less than that. It took the lists which had been prepared by the Ministry of Education and added to those lists instead of critically examining them. Secondly, the lists maintained by the Ministry of Education were really based on the communal pattern which followed from the Montford reforms. Thus the basic philosophy of the Kalelkar Commission was invariably conditioned by the communal approach which fragmented the Indian society into groups of similarly situated persons and then arranged these groups into a hierarchical order.

The Commission, however, made two interesting suggestions. One was that all women should be treated as backward, and the other was that all landless labourers or persons having uneconomic holdings should be treated as backward. These two suggestions deserve to be closely noted because they are the only breakthrough from the stranglehold of caste characteristics. It may also be argued that the Kalelkar Commission recognised that caste was not the *causa causans* of backwardness but was only symptomatic of it. Unfortunately, these two groups were considered to so swallow the ranks of backward classes as to make affirmative action well nigh impossible. The Government of India therefore rejected the recommendations and advised the States to continue the existing lists and make surveys to determine the backward classes.

2. The Havannur Commission

The States discovered that the job of operationalising backwardness was not a cakewalk. The experiences of the State of Mysore are typical. There was almost a running battle between the judiciary and the State Government ultimately culminating in the Havannur Commission.

The Commission decided to elicit data regarding the backwardness of the State by preparing an elaborate questionnaire.

This questionnaire was divided into 15 parts and contained 40 questions to be answered. The information elicited pertained to: (1) criteria relevant for considering classes as backward; (2) population; (3) religious and social disabilities; (4) economic conditions; (5) educational passing criteria; (6) traditional occupations; (7) denotified tribes; (8) agricultural and industrial labour; (9) political involvement; (10) employees in government departments and public undertakings; (11) housing, health and sanitation; (12) manners and customs; (13) prohibition; (14) exploitation and (15) culture, arts and crafts.

The questions were widely circulated on and from 9th October, 1972. When the Commission found that it was very difficult to get the questions with their answers back, even after reminders, it requested the government to confer on it the powers of court by constituting it under the Commissions of Inquiry Act, 1952. The government consented and the said powers were conferred on it on 9th October, 1973, by investing it with powers under Section 5(1) and with additional powers under Section 5(2), (3), (4) and (5) of the Act. By this the Commission was able to ask for and collect data.

The Commission collected information relating to education from 1865 high schools and 11,000 primary schools through the 20 Deputy Directors of Public Instruction. The Heads of the Department and Secretaries to the Government supplied the census of the employees.

The Socio-economic Survey.—This survey was conducted to determine the economic backwardness of castes and communities, keeping in view, as the Commission states, the Supreme Court decisions. For the purpose of the survey, due to the non-availability of trained investigators in sufficient numbers, the government had to appoint the social welfare inspectors of each taluk and Sanitary Health Inspectors of corporations and municipalities as investigators. It is claimed that every individual in the selected villages and urban blocks/wards was covered under the said survey. The Commission selected 200 villages, with at least one village from one taluk and 204 blocks from city/town/municipal areas. In the matter of selection of villages and city/town blocks, 20 District

Social Welfare Officers were consulted. The number of villages ultimately surveyed was 193 and urban blocks 185, covering 63,650 families with about 3,55,000 population. 318 Investigators collected the information for more than six months under the supervision of 20 District Social Welfare Officers and 19 District Statistical Officers.

The report was submitted to the government on 19th December, 1975.

Findings of the Commission

(1) *Determination of Educational Backwardness.*—The Commission felt the proper criterion for determining backwardness in education was the passing in the SSLC examination. The reasons given for taking the SSLC criterion were :

- (a) considering that compulsory and free education was introduced and a very large number of drop-outs were from the backward castes and communities who later lapsed into illiteracy ;
- (b) for entry into government service of the last grade in non-gazetted cadres, and for admission to various courses of study preparatory to university degree, the minimum qualifying examination was a pass in the SSLC examination.

For the purpose of study, the year selected was 1972. The Commission determined the caste/community-wise passing of the students per thousand of the State population. The State average came to 1.69 per thousand of the State population. This was taken as the dividing line and the Commission decided that a caste or community whose student average was below the State average should be treated as 'educationally backward'.

(2) *Determination of Social Backwardness.*—On the basis of the data collected in the course of the socio-economic survey taking into account the statistical data on educational attainments at the High School level, taking into account the evidence of witnesses that appeared before it and its own personal impressions, the Commission came to the conclusion that sixteen factors were responsible for the social backwardness. These are :

- (i) The majority of the people belonging to castes and

communities specified by us are residing in rural, isolated and segregated areas.

- (ii) Their economic condition is so poor that the majority of the castes and communities are incapable of owning land, house or other property.
- (iii) Occupations in which they are engaged are very unremunerative, and they do not get adequate return for their labour. Their occupations are considered unclean or inferior, and therefore low.
- (iv) People of the advanced castes and communities entertain prejudice against them.
- (v) Low status or inferiority associated with their castes makes it difficult for members of the backward classes to have access to places of cultural training, or to have religious and secular education.
- (vi) Many of the castes and communities have been segregated from the advanced communities due to social taboos against inter-dining and inter-marriage, and against similar opportunities of association.
- (vii) Backward classes are being prevented from enjoying status in society due to the age-old social customs.
- (viii) Due to their habitation in rural areas and segregated and isolated places, their economic poverty, their inferior and unremunerative occupations, unhealthy conditions in which they are living, absence of contact with the advanced communities and prejudice in the minds of advanced communities, backward classes have developed apathy for education. The absence of adequate number of educational institutions in rural areas has also contributed to their educational backwardness.
- (ix) There are no residential hostel facilities for the members of the backward classes either in rural areas or in urban centres. They do not have resources to open educational institutions and provide hostel facilities to the members of their own castes and communities, as is done by the advanced communities.

- (x) Government also has not cared hitherto to open required number of schools, high schools, colleges and free hostels in the rural areas to encourage students belonging to the backward classes.
- (xi) Government policy of sanctioning larger number of high schools and colleges to private agencies to meet the increasing demand made by the advanced communities has aggravated educational disparities between the advanced castes and backward castes.
- (xii) The method of selection of students at every level for promotion to the higher standard and course of study on the so-called theory of merit has cut at the roots of the sources supplying students belonging to backward classes. This rejection of students belonging to backward castes and communities has acted as a damper on those communities to pursue further studies.
- (xiii) Occupational, environmental and economic conditions have resulted in many drop-outs from the backward castes and communities, and they have also contributed to the stagnation of students.
- (xiv) The non-co-operative and discouraging attitude of some of the educational institutions founded and managed by certain castes and communities has not helped the educational advancement of backward castes and communities.
- (xv) The present system of education has not at all helped the backward castes and communities.
- (xvi) The scheme of compulsory primary education has not attracted and enrolled proportionate number of students between the age of 6 and 14 from the backward castes and communities.

Both the methodology and the conclusions of the Commission have been roundly criticised. Mr. Coutinho¹⁷ has assayed a perceptive critique of the Commission in which he makes the following points :

17. Coutinho, V.B. : *Operationalising Equality in Karnataka*, unpublished paper read at the Seminar on Supreme Court and Civil Liberties, Ranikhet.

1. The Commission has failed to show that the castes which it has declared as backward are as a whole educationally and socially backward.

2. The Commission has not adopted proper method of sampling thereby leaving room for sample bias.

3. The sample covered only 171 castes, tribes and communities but a total of 205 castes or groups were declared as backward thereby showing that the Commission travelled beyond its sample.

4. In deciding the adequacy of employment it ignored many public utilities and only considered 110 government departments.

The ponderous exercise of the Havannur Commission resulted in the acceptance of an economic criterion also. Families having income of Rs. 8000 or more per annum were not entitled to reservations and in case of cultivators or petty businessmen or labourers the income limit was reduced to Rs. 4800. The Commission's report is a tremendous exercise in bringing in as many caste groups as possible within the ambit of backwardness.

3. The Mandal Commission

The Central Government appointed another commission in 1978 to determine the criteria. The Mandal Commission was no exception to the fondness of commissions for identifying social backwardness with caste status. Beginning with the assertion that castes were the building bricks for Hindu social structure and after quoting from *Rigveda*, the *Ramayana*, the *Mahabharata*, and Gandhi the Commission polemically asked whether it would be too much to say that in the traditional society social backwardness was a direct consequence of the caste status. On the basis of its sample social survey the Commission generated a set of eleven indicators divided into three groups—social, educational and economic. The weightage given to these was also different so that a larger weightage was attached to social indicators and that minimum weightage was attached to economic indicators. The Commission felt that out of a possible score of twenty-two if any caste scored eleven points it would be treated as backward. The list of indicators is:

A. Social

- (i) Castes/Classes considered as socially backward by others.
- (ii) Castes/Classes which mainly depend on manual labour for their livelihood.
- (iii) Castes/Classes where at least 25% females and 10% males above the State average get married at an age below 17 years in rural areas and at least 10% females and 5% males do so in urban areas.
- (iv) Castes/Classes where participation of females in work is at least 25% above the State average.

B. Educational

- (v) Castes/Classes where the number of children in the age group of 5-15 years who never attended school is at least 25% above the State average.
- (vi) Castes/Classes where the rate of student drop-out in the age of 5-15 years is at least 25% above the State average.
- (vii) Castes/Classes among whom the proportion of matriculates is at least 25% below the State average.

C. Economic

- (viii) Castes/Classes where the average value of family assets is at least 25% below the State average.
- (ix) Castes/Classes where the number of families living in *kutcha* houses is at least 25% above the State average.
- (x) Castes/Classes where the source of drinking water is beyond half a kilometre for more than 50% of the households.
- (xi) Castes/Classes where the number of households having taken consumption loan is at least 25% above the State average.

As the above three groups are not of equal importance for our purpose, separate weightage was given to 'indicators' in each

group. All the Social Indicators were given a weightage of one point each. Economic, in addition to Social and Educational Indicators, were considered important as they directly flowed from social and educational backwardness. This also helped to highlight the fact that socially and educationally backward classes are economically backward also.

It may be interesting to observe that on this count even if a caste scored zero on all the educational and economic criteria but scored all the points in the social criteria, it would be backward. Thus an educationally and economically developed caste would also be backward if it is socially backward. No wonder that the Commission ended up by declaring 25% of the population in India as backward to which may be added 22.56% Scheduled Castes and Scheduled Tribes making a total of nearly 75%. One's sympathies go with the heroic effort of the Commission.

The report of the Commission has already been criticised by the Minorities Commission and rejected by the Committee of Secretaries constituted by the Government of India to look into its recommendations. Of course, some faults are obvious. The Commission has without doubt used caste as the predominant if not the sole criterion of backwardness.

Secondly, the Commission has not explained why it chose to assign differential weightage to social, educational and economic backwardness and particularly why it devolved educational backwardness while determining the classes who are socially and educationally backward.

Thirdly, the Commission ignored its own surveys. The study prepared by the Tata Institute of Social Sciences for the use of the Commission validated certain hypotheses which clearly showed that the numbers, political consciousness and dominance of the backward castes play a vital role in determining their share in government largesse and yet the Commission completely ignored the sharing of political power as an indicator of backwardness.

Social scientists would invariably find academic reasons to dispute the sampling procedures but we have only to add that the merits which the Commission claims for its recommendations are

objectivity and dependability and as a testimony it observed that 'as a result of its application most of the well-known socially and educationally backward castes were identified as backward'. In other words, it maintained the status quo.

V

On re-reading Balaji

Twenty years is enough period for good wines to mature and Balaji¹⁸ deserves much more attention than wines. It has been taken as an authority for two propositions, one, that caste alone cannot be treated as the criterion of social backwardness and secondly, that the reservations cannot exceed fifty per cent. Both these findings are not only rough summarizations of *Balaji* but are also positive misrepresentations.

Gajendragadkar formulated his finding in very carefully guarded terms. He observed:¹⁹

If the classification of backward classes of citizens was based solely on the caste of the citizen, it may not always be logical and may perhaps contain the vice of perpetuating the castes themselves. Besides, if the caste of the group of citizens was made the sole basis for determining the social backwardness of the said group, that test would inevitably break down in relation to many sections of Indian society which do not recognize castes in the conventional sense known to Hindu society . . . that is why we think that though caste in relation to Hindus may be a relevant factor . . . it cannot be made the sole or dominant test in that behalf. Social backwardness in the ultimate analysis is the result of poverty to a very large extent . . . it is true that social backwardness which results from poverty is likely to be aggravated by consideration of caste . . .

The occupations of citizens may also contribute to make classes of citizens.

These observations show two negative and two positive tests. Positively, economic-cum-educational status is considered relevant by the court. Negatively, caste is considered irrelevant

18. *M. R. Balaji v. State of Mysore*, AIR 1963 SC 649.

19. AIR 1963 SC 649, 658.

because it is not applicable to all the citizens and because it imports the very vice which is sought to be eradicated.

The order in question in *Balaji* was an order revising an earlier order of 1951. That order on its very face stated that the only practicable method of determining backwardness was castes and communities and as such the impugned order was considered to have proceeded on the consideration only of caste ignoring the other factors which were undoubtedly relevant. The court had indicated two such factors. The energies of the Havannur and the Mandal Commissions have been spent in chasing the phantom of caste as the sole determinant. It led the Mandal Commission to conclude that there was a considerable shifting of emphasis in *Rajendran's* case²⁰ as the upshot there was that caste-wise classification was held valid.

The Mandal Commission similarly misread the *Jayshree* case²¹, which it read as saying that a classification based only on poverty was not logical. Chief Justice Ray had actually observed as follows:²²

In ascertaining social backwardness of a class of citizens it may not be irrelevant to consider the caste of the group of citizens. Caste cannot, however, be made the sole or dominant test. Social backwardness is in the ultimate analysis the result of poverty to a large extent. Social backwardness which results from poverty is likely to be aggravated by considerations of their caste. This shows the relevance of both caste and poverty in determining the backwardness of citizens. Poverty by itself is not the determining factor of social backwardness. Poverty is relevant in the context of social backwardness. The Commission found that the lower income groups constitute socially and educationally backward classes. The basis of the reservation is not income but social and educational backwardness determined on the basis of relevant criteria. If any classification of backward classes of citizens is based solely on the caste of the citizen it will perpetuate the vice of caste system. Again if the classification is based solely on poverty it will not be logical. The society is taking steps for uplift of the people.

20. *C.A. Rajendran v. Union of India*, AIR 1968 SC 507.

21. *K.S. Jayshree v. State of Kerala*, (1976) 3 SCC 730.

22. *Id.* 735.

It is not the purpose of this paper to discuss the development of doctrine through the cases and therefore a case analysis is not called for. The purpose of the paper would be well served if it is recognised that the courts are consistently trying to militate against the mere labelling techniques used by the various State governments and the commissions constituted by them and the Central Government. The insistence of the courts is on development of criteria which may seek to indentify backward classes and not merely label groups claiming protection as target groups.

VI

Conclusion

The approach of the courts to the question of operationalising backwardness is premised on the liberal model. The courts conceive of affirmative action as the means to offset the handicaps produced by social contingencies over a period of time but this they want to do without jeopardising the meritocratic basis of the distribution of opportunities. The courts, therefore, legitimise a notion of equal opportunity where failure is identified with incompetence and those who fail have nobody to blame except themselves.

The courts therefore insist on a set of objective criteria which relate basically to groups of individuals similarly situated in a disadvantageous situation. Their emphasis is on identifying the social contingencies which are productive of disadvantage and they insist that the relation between the contingencies must not be diffused. On the contrary it should be immediate and palpable.

The preoccupation with the maintenance of a meritocratic hierarchy also led the courts to draw a line on the quantum of reservation because reservations should not jeopardise the continuation of the order of merit. The perspective of the court is protection of rights. Such perspective is a product of the needs basic to the preservation of the class structure of the Indian society. While insisting on formal equality and limiting remedial action the courts avoid imposition of remedial burdens on the rich. While the poor fight for reservations the rich can send their sons to private medical colleges charging heavy capitation fees. Secondly,

the courts absolve those who are not directly implicated in the perpetuation of inequality and legitimise the positions of advantages which had been previously obtained by such groups. Thirdly, the courts presuppose a world of atomistic individuals without a class structure when they subscribe to the myth of equality of opportunity. They believe that there is an objective notion of merit and those who succeed are in some sense better than those who fail. The spirit of the judicial approach is to maintain the appearance of the remedial efforts while securing the hegemony of crucial presuppositions which sustain the closure between the rich and the poor, between the oppressor and the oppressed, the deserving and the undeserving.

The governments on the other hand have been willing tools in the hands of the emergent political classes. A result of the land reform legislation has been to create a class of peasantry which the green revolution has made rich. This class is emerging as the new group having political power and seeking to consolidate their positions. The brief review of the history of affirmative action in Tamil Nadu and Mysore as well as in Bihar and U.P. has shown that the neopolitical leaders seek to consolidate their dominance by herding opportunities and thereby consolidating their hold further. The agrarian parents who constitute the first generation graduates also contribute first generation leaders and the two seek to work for each other through the policy of reservation. The inclusion of politically dominant groups among the beneficiaries of affirmative action may be good politics but is bad for the welfare of the deserving. This is the group which accentuates the feeling of relative deprivation, heightens class conflict and turns affirmative action into plans of tormentation of backward classes. The stories of atrocities on Scheduled Castes invariably reveal that the emerging class of political power holders have been on the prowl.

It should be realised that systematic preference to any group only adds to the distance between the privileged and the deprived. It neither ameliorates the tensions among the classes nor provides the minimum wherewithal of decent life. Like sanskritization it may lead to a change of positions but not a break in the hierarchy. Homohierarchichus survives; nay, is strengthened.

BACKWARDNESS IN INDIA— A JUDICIAL DILEMMA

K. K. ARORA

History holds testimony to the fact that over the centuries many sections of our caste-ridden society have been the victims of oppression and exploitation at the hands of the dominant groups in society. It is very difficult to gauge the extent and depth of social and economic exploitation that resulted in discrimination, misery, poverty and other disabilities for an appreciably large section of our population. Man has an intrinsic urge to revolt against injustice and the makers of the Indian Constitution were not oblivious of this reality. They had keen sense of perception and were aware of the dangers that inequality could breed. They made provisions in the Indian Constitution to promote secularism, ensure equality and eradicate injustice that had been heaped upon millions through the abominable 'principle of hierarchy'. Underlying those provisions is the philosophy of 'protective discrimination' aimed at breaking the bondages of religion, race, caste, sex, language and descent and ensuring to the weak, the deprived and the backward the opportunity to compete with the strong and more advanced.

The framers of the Indian Constitution also had before them the experience of the United States where the problem of racial segregation had generated considerable social tension. It will not be out of place to mention here that at one time the judiciary itself became an instrument to State segregation policy in U.S.A. In *Plessy v. Ferguson*¹, the Supreme Court of the United States upheld a State law requiring 'separate but equal accommodations' for the Negro railway passengers. Racial segregation provision was held non-discriminatory and compatible with Equal Protection Clause of the Fourteenth Amendment.

The 'separate but equal' doctrine laid down in *Plessy* case held its sway for over fifty years. This doctrine became the basis

* Reader, Faculty of Law, University of Jammu, Jammu.

1. 163 US 537 (1896).

for the segregation of the Negroes and other non-white races in the schools, colleges, railway coaches, restaurants, hotels and other institutions. But this doctrine caused considerable social tensions and generated widespread resentment in the minds of right-thinking members of that society. It had no moral basis and its hollowness had received enough public condemnation. It was in 1954 when the "separate but equal" doctrine met its end in the famous case of *Brown v. Board of Education of Topeka*². Chief Justice Warren speaking for the unanimous court rejected the long prevailing principle of "separate but equal" treatment. The court said :

To separate children from others of similar age and qualification solely because of their race, generates the feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone. . . . in the field of public education the doctrine of separate but equal treatment has no place. Separate educational facilities are inherently unequal.³

The American experience is a reminder of the well-known principle of justice that without eradication of discrimination, social equilibrium could not be maintained. It was this notion of equality that fired the framers of the Indian Constitution and they resolved to constitute India into a sovereign democratic republic and to secure to all its citizens justice—social, economic and political, liberty of thought, expression, belief, faith and worship and equality of status and of opportunity. Articles 14, 15, 16, 17, 18 and 23 were incorporated into the Constitution to fulfil this assurance that was held out in the Preamble to the Constitution. Rule of law has equality as its basis. Equality is not an abstract ideal but a guiding force towards the realisation of social and economic justice. The claim of equality is in fact a symbol of human protest against unjust and undeserved inequalities. In the words of William K. Frankena, "social justice is a system of distribution and redistribution which is governed by a valid moral principle".⁴

2. 347 US 483 (1954).

3. *Id.*, pp. 494-495.

4. Quoted in Richard B. Brandt (ed.): *Social Justice*, 1962, p. 3.

Ambedkar dismissed caste inequality as man-made rather than ordained by God. He said :

If I fail to do away with abominable thralldom and human injustice under which the class to which I belong has been groaning, I will put an end to my life with a bullet.⁵

It was largely because of Ambedkar's ardent support for the cause of depressed classes that the framers of the Indian Constitution agreed to make provisions for protective discrimination in the Indian Constitution. Protective discrimination is aimed at balancing the benefits of a social welfare State between the haves and the have-nots. It does not rob Peter to give it to Paul. It is primarily designed to uplift the backward sections of the society without harming the interests of the advanced sections of the society. But what does the word "backward" signify? According to Dr. K.M. Munshi: "The word backward signifies that class of people who are so backward that special protection is required for them in the services."⁹

For a very long time the terms "depressed classes" and "backward classes" were used synonymously. The definition of the term "depressed classes" was discussed in the Indian Legislative Council in 1916 and it was decided to include criminal and wandering tribes, aboriginal tribes and the untouchables within this term. Sir Henry Sharp explained this term to include classes pursuing "unclean profession" or those belonging to "unclean castes" and also classes who are backward and educationally poor and despised and also certain classes of Muhammadans.⁷

The Southborough Committee, 1919 however defined "depressed classes" as including untouchables but excluded primitive or aboriginal tribes and economically backward classes.⁸

But in the southern provinces the term "depressed or backward classes" indicated all castes and communities except *Brahmins*. It is thus clear that the term 'backward classes' never had any

5. Quoted in Dhananjay Keer: *Dr. Ambedkar: Life and Mission*, 1954, p. 446.

6. C.A.D., Vol. VIII, pp. 696-697.

7. See the Report of the Indian Franchise Committee, Vol. I, para 279, page 109 (1932).

8. *Id.*, para 282, p. 109.

definite meaning that could have received acceptance at the national level.

On 13th December, 1946, Nehru moved a resolution which was in the nature of policy underlying the Indian Constitution. Clause 6 of the resolution read :

Wherein adequate safeguards shall be provided for minorities, backward and tribal areas and depressed and other backward classes.⁹

The resolution received warm reception from different communities representing the Constituent Assembly. It was an assurance to protect the interests of the minorities and backward classes.

The word 'backward' was also added by the Drafting Committee in the Draft Constitution. Article 10(3) of the Draft Constitution provided :

Nothing in this article shall prevent the State from making any provision for the reservation of appointment or posts in favour of any backward class of citizens who in the opinion of the State are not adequately represented in the services under the State.

This came to be called as Article 16(4) of the Constitution. The Drafting Committee had introduced the word 'backward' before the word 'class' with a view to clarify the real beneficiaries of the protective discrimination. When controversy arose in the Constituent Assembly regarding the meaning of the term 'backward', K. M. Munshi said :

Except backward classes who are economically and socially backward, and the Scheduled Castes and Tribes who have a special claim of their own, no other minority should be recognised in the Constitution.¹⁰

Munshi rightly felt that the scheme of reservation was meant for the fulfilment of the social and economic needs of the backward classes who had lagged behind in the socio-economic life of the society.

9. C.A.D., Vol. I, pp. 58-60.

10. C.A.D., Vol. X, p. 261.

On January 29, 1953 the President appointed a Backward Classes Commission with Kaka Kalelkar as its Chairman. The Commission was directed to "determine the criteria to be adopted in considering whether any section of people (in addition to Scheduled Castes and Scheduled Tribes) should be treated as socially and educationally backward classes and in accordance with such criteria to prepare a list of such classes".

After two years of hard work the Commission prepared a list of 2399 castes and communities and came to the conclusion that nearly 70 per cent of India's population was backward. The Commission laid down the following tests for classifying socially and economically backward classes :

- (i) Lack of social position in the traditional hierarchy of Hindu society ;
- (ii) Lack of general educational advancement among major sections of a caste or community ;
- (iii) Inadequate or no representation in government services ;
- (iv) Inadequate representation in the field of trade, commerce and industry.¹¹

Although the Commission listed the criteria of literacy, representation in services, traditional occupations etc. for determining backwardness, yet it over-emphasised the importance of caste in making this determination. The Commission observed :

"Our society was not built on an economic structure but on the medieval ideas of 'Varna' caste and a social hierarchy."

The report of the Commission was laid before the Parliament on September 3, 1956. It invited severe criticism from the members. The emphasis on caste laid by the Commission was described as fraught with "the dangers of separatism".¹² On the report of the Commission a memorandum issued by the Ministry of Home Affairs said :

"Caste system was the greatest hindrance in the way of the country's progress towards an egalitarian society and recognition of the specified castes as backward might serve to

11. Report of Backward Classes Commission (BCC), Vol. I, p. 46.

12. Memorandum on the Report of the Backward Classes Commission, p. 4.

maintain and even perpetuate the existing distinction on the basis of caste.”¹³

Thus the Commission had failed to evolve viable criteria for determining backward classes. It may be pointed out that finding out suitable criteria for ‘backwardness’ on an all-India basis is not an easy task. This difficulty was fully appreciated by the Kalelkar Commission. Under our system there is no constitutional requirement that backward classes should be designated only by the Centre. Many States have, therefore, keeping in view their local conditions, adopted varying criteria for the identification of backwardness.

In Mysore, from 1921 till 1960s, the backward classes included everyone excepting *Brahmins* and those whose mother-tongue was English. The term ‘Backward Classes’ was synonymous with ‘non-Brahmins’. It was in *Balaji’s* case¹⁴ that the Supreme Court struck down the government order listing backward classes on ‘castes’ and ‘communities’ basis. As a result of the *Balaji* decision the Mysore Government modified its list using the test of income and occupation.

In Kerala, a Backward Classes Reservation Commission was appointed under the chairmanship of P. D. Nettur. In its report submitted in 1970, the Commission emphasised that backward classes should be drawn from all communities irrespective of caste or religion.¹⁵ The Commission recommended that education, economic position and social backwardness due to historical reasons should be considered for delineating backward classes. The Nettur Commission report was accepted by the Achuta Menon ministry which took steps to implement it.

The Government of Jammu and Kashmir appointed a Backward Classes Committee under the chairmanship of Justice J. N. Wazir. The Committee submitted its report in November 1969 and provided therein that persons who pursued one of the 63 specified traditional occupations and persons belonging to 23 social

13. *Id.*, p. 3.

14. AIR 1963 SC 469.

15. Report of the Backward Classes Reservation Commission, Govt. of Kerala, 1970, in two volumes.

castes, and those residing in areas adjoining the ceasefire line and in bad pocket areas were socially and educationally backward. The government accepted the recommendations of the Committee. The reservation on this basis was later challenged before the Supreme Court in *Janaki Prasad's* case.¹⁶

The Second Backward Classes Commission was appointed by the President under Article 340 in 1979 under the chairmanship of Mr. B. P. Mandal. The Commission in its report has evolved eleven indicators or criteria for determining social and educational backwardness.¹⁷ They are :

A. Social

- (i) Castes/Classes considered as socially backward by others.
- (ii) Castes/Classes which mainly depend on manual labour for their livelihood.
- (iii) Castes/Classes where at least 25 per cent females and 10 per cent males above the State average get married at an age below 17 years in rural areas and at least 10 per cent females and 5 per cent males do so in urban areas.
- (iv) Castes/Classes where participation of females in work is at least 25 per cent above the State average.

B. Educational

- (i) Castes/Classes where the number of children in the age group of 5-15 years who never attend school is at least 25 per cent above the State average.
- (ii) Castes/Classes where the rate of student dropout in the age group of 5-15 years is at least 25 per cent above the State average.
- (iii) Castes/Classes amongst whom the proportion of matriculates is at least 25 per cent below the State average.

16. (1973) 1 SCC 420 : AIR 1973 SC 930.

17. L.G. Havannur: "Mandal Commission Analysed", *Public Interest Law Reporter*, p. 27.

C. Economic

- (i) Castes/Classes where the average value of family assets is at least 25 per cent below the State average.
- (ii) Castes/Classes where the number of families living in *kutcha* houses is at the State average.
- (iii) Castes/Classes where the source of drinking water is beyond half a kilometre for more than 50 per cent of the households.
- (iv) Castes/Classes where the number of households having taken consumption loan is at least 25 per cent above the State average.

All the social indicators were given a weightage of 3 points each, educational indicators a weightage of 2 points each and economic indicators a weightage of one point each. Implications of the recommendations of the Mandal Commission Report have yet to be felt, yet it cannot be denied that the Commission in laying criteria for backwardness has evinced lack of vision and insincerity of purpose. A close scrutiny of the indicators evolved by the Commission will reveal that a considerable emphasis has been placed on 'castes' for determining backwardness. A criterion based on 'caste test' cannot be easily applied to Muslims, Christians and other non-Hindu communities which do not recognise caste system in the conventional sense of the term. The Commission's findings are not supported by any data which could lend a stamp of authenticity to the criteria chosen. Have our State governments prepared records from where one could get information on the lines suggested by the Commission to determine backwardness? Perhaps the answer to this question is a big 'no'.

The Commission constituted a panel of experts headed by Professor M. N. Srinivas which recommended that 1.00 per cent villages at the district level should be sampled to identify the majority of backward classes. This expert opinion was ignored by the Commission and consequently its findings cannot be accepted as scientific. Mr. Havannur has rightly suggested that the President should seek the opinion of the Supreme Court under Article 143 on the constitutional validity of the Mandal Commission's recommendations.

The question of backwardness has also become a subject-matter of considerable litigation. No doubt the judiciary has over the years made numerous attempts to evolve a secular, scientific and rational formula for adjudging backwardness, yet the judicial attempts in this direction have not resulted in concretising any well-defined principle that could find application in every case. The story starts with the decision of the Supreme Court in *Champakam* case.¹⁸ In this case the Madras Government with a view to help backward classes reserved seats in the medical and engineering colleges for caste-based groups like Brahmins, Hindus, Muslims and Christians without considering the merit of the students. The Supreme Court struck down the communal G.O. as being violative of Article 15(1) and Article 29(2). Although the Directive Principles of State Policy embodied in Article 46 lay down that the State should promote with special care the educational and economic interests of weaker sections of the people and protect them from social injustice, the court held that Directive Principles of State Policy could not override the Fundamental Rights of the citizens enshrined in Part III of the Constitution of India.

To negative the effect of this judgment clause (4) was added to Article 15. It provides that the State can make "special provisions for the advancement of socially and educationally backward classes of citizens or for the Scheduled Castes and Scheduled Tribes". But Article 15(4) does not lay down any criteria to determine 'social and educational backwardness'. This clause is an enabling provision. It enables the State to make special provisions for the educational, economic or social advancement of socially and educationally backward classes of citizens or for the Scheduled Castes and Scheduled Tribes. The State, however, under the guise of making special provisions for the advancement of weaker elements in the society cannot reserve practically all the seats available in the colleges so as to exclude admissions to deserving and qualified candidates of other communities. In *M. R. Balaji v. State of Mysore*¹⁹, the

18. AIR 1951 SC 226.

19. AIR 1963 SC 469.

question was how to strike a balance between the two fundamental rights guaranteed to citizens by Article 15(1) and Article 29(2) on the one hand and the promotion of the educational and economic interests of the weaker sections of the people mentioned in Article 46 on the other. The court was also faced with the onerous task of laying down a test for determining backwardness. Could caste be treated as a criterion for determining backwardness of a particular class? The Supreme Court unanimously speaking through Gajendragadkar, J. made it clear that though caste in relation to Hindus could be a relevant factor for determining the social backwardness of a class of citizens, it could not be made the sole test of backwardness. The court said :

Social backwardness is in the ultimate analysis the result of poverty to a very large extent. The classes of citizens who are deplorably poor automatically become socially backward . . . the occupations of citizens may also contribute to make classes of citizens socially backward.²⁰

Thus the Supreme Court while emphasising that caste could be a relevant factor for determining backwardness, also pointed out that poverty, occupations and place of habitation could also contribute to backwardness and such factors could not be ignored.

While Article 15(4) speaks of 'social and educational backwardness' another corresponding provision which speaks of backwardness is Article 16(4). Article 16(4) is an exception to Article 16(1) and Article 16(2). Article 16(1) provides that all citizens shall have equality of opportunity in matters relating to employment or appointment to any office under the State. Article 16(2) provides that no citizen shall on the ground only of religion, race, caste, sex, descent, place of birth, residence or any of them be ineligible for or discriminated against in respect of any office or employment under the State. Article 16(4) as an exception to Article 16(1) and Article 16(2) provides that the State may make reservation for 'backward classes of citizens' if they are not adequately represented.

Backwardness is a product of complex factors and this complexity was judicially felt in *State of Kerala v. Jacob Mathew*²¹.

20. *Id.*, p. 659.

21. AIR 1964 Ker 360.

In this case the Kerala High Court pointed out that 'social backwardness contributes to educational backwardness and educational backwardness perpetuates social backwardness and both are inevitable corollaries of extremes of poverty and the deadening weightage of custom and tradition'.

In *Chitralekha v. State of Mysore*²², the Government of Mysore by an order defined backward classes and directed that 30 per cent of the seats in professional and technical colleges be reserved for them and 30 per cent be reserved for Scheduled Castes and Scheduled Tribes. The government order made economic conditions and occupation as the basis for determining social and educational backwardness. Subba Rao, J. speaking for the majority emphasised that 'classes' contemplated in Article 15 were not 'castes'. He pointed out that the expression 'classes' was not synonymous with 'castes' and observed :

If we interpret the expression 'classes' as 'castes', the object of the Constitution will be frustrated caste is taken only as one of the considerations to ascertain whether a person belongs to a backward class or not.²³

Thus it is easily discernible that the decision in *Chitralekha* strengthened and reiterated the position taken by the Supreme Court in the *Balaji* case, namely, that caste also could not be made as the sole or even the dominant criterion for identifying the backward classes.

In *P. Rajendran v. State of Madras*²⁴, the Supreme Court upheld a classification arranged solely in terms of caste. The State claimed that although the list was prepared in terms of castes, the castes really represented classes of backward people based on the occupations they pursued. Mr. Justice Wanchoo, speaking for the court, observed that the petitioners had made no attempt "to show that any caste mentioned in this list was not educationally and socially backward," and for this reason accepted the contention of the State and upheld the classification. It may be submitted that in the *Rajendran* case the Supreme Court appears to have

22. AIR 1964 SC 1823.

23. *Id.*, p. 1834.

24. AIR 1968 SC 1012.

retraced its steps and made a departure from the rule which it had laid down in *Balaji's* case that caste should not be made the sole criterion of classification. According to Dr. P. K. Tripathi: "Although the judgment in *Rajendran* case paid lip service to the rule in *Balaji* that caste should not be the sole criterion of classification, in effect it marked a setback to the new trend towards retrieving the fundamental right in Article 15(1)."²⁵

Commenting on the *Rajendran* case, Dr. Ghose said: "*Rajendran* case revived the controversy which thought *Balaji* and *Chitralekha* had laid to rest. . . . In the light of these clear pronouncements, was it open to the *Rajendran* court to hold without overruling those cases that a caste is also a class of citizens? Does Article 15 seek to eradicate casteism in clause (1) and preserve it in clause (4)?"²⁶

In *State of Andhra Pradesh v. P. Sagar*²⁷, the G.O. selected backward candidates for medical colleges in the State and the backwardness was determined on the basis of their castes and communities. No material was placed before the court to show that the list prepared by the government conformed to the requirement of clause (4) of Article 15. The Supreme Court held that clause (4) of Article 15 was by way of an exception to the fundamental right in clause (1) and therefore if it was shown that, *prima facie*, a classification infringed the right in clause (1), it was for the government to show that it was protected by the exception in clause (4). The Supreme Court further said that a classification based on caste did, *prima facie*, violate the right in clause (1). The court emphasised that the materials on the basis of which backwardness had been determined and lists prepared must be placed before the court so that it could satisfy itself that the constitutional requirement had been satisfied. This was not done in the present case. The G.O. was struck down by the court. Shah, J. said:

The criterion for determining the backwardness must not be based solely on religion, race, caste, sex, or place of birth,

25. P.K. Tripathi: *Some Insights into Fundamental Rights*, p. 202.

26. Mohd. Ghose: "Judicial Control of Protective Discrimination", 11, JILI, 1969, p. 371.

27. AIR 1968 SC 1379.

and the backwardness being social and educational must be similar to the backwardness from which the Scheduled Castes and the Scheduled Tribes suffer.²⁸

Evidently the Supreme Court had discouraged the tendency to determine backwardness on the basis of castes.

In *Triloki Nath v. State of J & K*²⁹, the order of the State Government reserved 50 per cent of the posts for the Muslims of the State of J & K, 40 per cent for the Hindus of Jammu and 10 per cent for the Pandits of Kashmir. The contention of the State was that the majority community both in the valley as well as in Jammu region was inadequately represented in the State services. The Supreme Court held the order as violative of Article 16(1) and Article 16(2) and characterised it as not a reservation for backward classes. The Supreme Court described it as a system of distribution of posts on the basis of community or place of residence. Article 16(4) cannot be invoked merely because a class of citizens is not adequately represented in such services. If this argument was accepted, the court said, "it would exclude the backward classes from the benefit of Article 16(4) and confer the benefit only on a class of citizens who, though rich and cultured, have taken to other avocations of life".³⁰

The *Rajendran* trend which had suffered a setback in *P. Sagar's* case was again revived by the Supreme Court in *State of A. P. v. Balaram*.³¹ In 1970 the Andhra Pradesh Backward Classes Commission had drawn up a list of 92 communities. The list which was based on 'castes' and 'community' was upheld by the Supreme Court in *Balaram's* case. The Supreme Court held that in determining backwardness the government could take into account the percentage of educated boys in a caste or community and after assessing their poverty and social status if it was found that a caste was educationally and socially backward, its inclusion in the list of backward classes would not be bad.

28. *Id.*, p. 1383.

29. AIR 1969 SC 1.

30. *Id.*, p.4.

31. (1972) 1 SCC 660: AIR 1972 SC 1375.

In *Janki Prasad v. State of J & K*³² the validity of the J & K Scheduled Castes and Backward Classes Reservation Rules, 1970 was challenged. These rules provided that persons belonging to the specified 63 traditional occupations and 23 social castes, small cultivators, low paid pensioners, residents of an area adjacent to the ceasefire line and residents of areas designated as "bad pockets" were backward. The court found that all the listed occupations were not traditional. It, therefore, suggested revision of the list of these occupations. Under the list, the traditional occupation included the occupation of the grandfather of a person even if his father had abandoned it. This would have enabled a person to claim protective discrimination from the State on the basis of the occupation of his grandfather. The Supreme Court held that this rule of treating an occupation as traditional was bad and must be suitably revised.

Again, the basis for classifying 23 castes as socially backward castes was not disclosed to the court. The Supreme Court declined to accept four of these castes as backward. The court further said that in classifying cultivators and dependents of pensioners as backward, the respondent committed the error of placing "economic considerations above considerations which go to show whether a particular caste is socially and educationally backward".

In *State of Uttar Pradesh v. Pradip Tandon*³³ the U. P. government made reservation of seats in the State medical colleges in favour of candidates from the rural, hill and Uttarkhand areas. The Supreme Court upheld reservations in favour of hill and Uttarkhand areas as it was satisfied that the people therein were socially and educationally backward, but reservation in favour of rural people was held unconstitutional. The rural population being 80 per cent of the entire State population, the court found it incomprehensible as to how such a large population could be regarded as backward. The court refused to accept the test of poverty as the determining factor of social backwardness. Ray, C.J. observed:

If poverty is the exclusive test, a large population in our country would be socially and educationally backward class

32. (1973) 1 SCC 420; AIR 1973 SC 930.

33. (1975) 1 SCC 267.

of citizens. Poverty is evident everywhere and perhaps more so in educationally advanced and socially affluent classes.³⁴

It may be submitted that distinction between rural and urban areas cannot be based on economic conditions as persons living in rural areas are not necessarily poor nor those living in urban areas necessarily rich. Therefore, the court was very right in rejecting the plea of the government in treating the rural population as backward.

In *K. S. Jai Shree v. State of Kerala*³⁵, Ray, C.J. speaking for the court emphasized the need for adopting means-cum-caste/community test in classifying backward classes. He said that the rich people among the backward castes/communities ceased to be socially and educationally backward classes even though they had not acquired any high level of education. With the economic advancement, the social disabilities of the members of the backward castes and communities to a large extent were dispelled.

Thus in *Jai Shree* the court conceded that caste could be a relevant factor although it could not be the exclusive test of backwardness. This ruling of the Supreme Court is compatible with its earlier rulings in *Balaji* and *Chitrallekha* cases.

In *K. Ramakrishna v. Director of Medical Services*³⁶ the Andhra Pradesh High Court upheld reservation of seats for Scheduled Castes in postgraduate courses in medicine.

But in *Dr. M.N. Rao v. Government of Andhra Pradesh*³⁷, Choudhary, J. expressed doubt as to whether a person possessing M.B.B.S. could claim to be educationally backward. The petitioner in this case belonged to a backward class. Choudhary, J. was of the view that once a person from these classes acquires the M.B.B.S. degree, he should compete for admission to M.D. or M.S. on the basis of merit.

There is great force in this argument. An M.B.B.S. cannot be treated as educationally backward. Once a person has had the

34. *Id.*, p. 276.

35. (1976) 3 SCC 730.

36. AIR 1979 AP 223.

37. (1980) 1 APLJ 115.

benefit of reservation on the ground of backwardness at the initial stage of his seeking admission in educational institutions, he could not continue to have that privilege even if he had ceased to be educationally backward. Choudhary, J. has, in fact, reminded the policy makers that reservation benefits could not be continued in a progressive society till eternity and means and ways have to be devised to withdraw classes from the orbit of reservation.

In *Raghava Panicker v. Administrator, Union Territory, Lakshadweep*³⁸, the Kerala High Court observed :

For the benefit of the weaker and socially and educationally backward sections of the people reservations are permissible as saved by Article 15(4) If in the name of protection under Article 15(4), cent per cent seats are reserved for the benefit of a particular community whether it is a majority community or a minority community, to the detriment of the rest, such reservations would cut at the very root of the fundamental rights guaranteed under Article 15(1). The class of communities envisaged as backward in the concept in which it has been used in the Constitution cannot cover a bulk of State's population.

Again, the High Court of Punjab and Haryana had the opportunity of considering the question of backwardness in April 1982 in *Gauri Shanker v. State of Haryana*³⁹. The question before the court was whether the income criterion could be used for determining backwardness. The court was of the opinion that poverty was the root cause of social and educational backwardness and therefore while determining social and educational backwardness, the economic aspect could not be overlooked. The court emphasised that, no doubt, the authority concerned could take caste into consideration in ascertaining the backwardness of a group of persons, but if it does not, its order will not be bad on that account, if it can ascertain the backwardness of a group of persons on the basis of other relevant criteria. Caste is only a relevant and not a compelling circumstance in ascertaining the backwardness of a class. If the classification of backward classes of citizens was based solely on the caste of the citizens, it might not always be logical and might perhaps contain the vice of perpetuating the

38. AIR 1982 Ker 114.

39. AIR 1982 P & H 100.

caste system. If caste was made the sole basis for determining the social backwardness, that test might inevitably break down in relation to many sections of the Indian society which do not recognise castes in the conventional sense known to Hindu society.

The economic basis for determining backwardness, on the other hand, removes the abovesaid defects. This test provides a just and equitable basis for determining backwardness and extends a helping hand to all those who really deserve such assistance for their advancement in education.

Conclusions

Summing up the discussion regarding the concept of 'backwardness' that has eluded the precise grasp of various Backward Classes Commissions and has also baffled judicial minds over the years, it may be submitted that caste, race and religion should not be made the basis for delineating 'backwardness'. Prof. P.K. Tripathi has rightly said : "... As long as caste remains even one of the several criteria on the basis of which backwardness is to be determined, it will be found that in the ultimate analysis, it will emerge as the sole basis of differentiation and will, therefore, make the classification invalid."⁴⁰ We have to stop thinking in terms of castes and religion if we have to realize the ideal of a secular and casteless society.

Again, caste cannot be made the basis of classification for the reason that many sections of the Indian society do not recognise castes in the conventional sense known to Hindu society. Article 340 makes it clear that commissions can be appointed for investigating who are backward classes, and it would be contrary to the letter and spirit of the Constitution if such commissions made caste or religion the criterion for backwardness.

The prevailing caste system and religion have been responsible for bloodshed, exploitation, social upheaval and turmoil and therefore the call of the time is to pull down these barriers once and for ever. In the words of Mr. Ghouse : "In our caste-ridden society, the caste-oriented behaviour of the vote has led to the

40. P. K. Tripathi : *Some Insights into Fundamental Rights*, p. 203.

emergence of political parties banking on caste-communalism. Such parties, under strong pressure from their voters, will confer special privileges and benefits on those who may not even need them."⁴¹

The test of occupation for determining "backwardness" presents many difficulties. The Hindu *Varna* system was originally based upon occupation that each *Varna* pursued. The choice of occupation was thus limited by the accident of birth. Therefore, if occupation was adopted as the test for determining backwardness, it would ultimately degenerate into a 'caste' test for backwardness—an anomaly which must be avoided. Again, in the modern welfare State, the concept of traditional occupation has become obsolete and redundant. A traditional occupation means an occupation which is handed down by an ancestor to his posterity. Nowadays, an individual, under the pressure of fast-changing social panorama, may have to change his occupations so often that it may become difficult to identify his traditional occupation.

The income test can certainly prove very useful in determining backwardness. There is no denying the fact that social backwardness can be the inevitable result of poverty and, therefore, this factor must not be overlooked in evolving a viable and secular criteria for backwardness. But in *Pradip Tandon's* case⁴² it was rightly pointed out that poverty could also not be the exclusive test of backwardness. If it were so then a large population in our country would be socially and educationally poor. In our country a vast majority of our population is engaged in agricultural occupation and their income is either unrecorded or concealed or even difficult to determine. This creates considerable difficulties in the application of poverty test.

Lastly, it may be submitted that the problem of determining backwardness is highly complex. No single test can be sufficient for delineating backwardness. Poverty, education, geographical placement and other factors must all be considered together to

41. Mohd. Ghouse: "*Judicial Control of Protective Discrimination*", p. 377.

42. (1975) 1 SCC 267.

evolve a coherent and rational basis for backwardness. Social thinkers and legal luminaries will have to work in coordination in undertaking an in-depth study of the problem. There is an urgent need to identify the receivers of protective discrimination ; otherwise the great edifice of our democracy might suffer a jolt and crumble to pieces under the sheer weight of its own contradictions. The benefits of this policy cannot be allowed to be squandered on the undeserving. Even if a class or a section of people is found to be backward today, the courts or the legislature should not act on the presumption that that class would continue to be backward for all times to come. Social scientists and the lawyers would have to conduct empirical studies periodically to assess the attainments of the members of that class in different walks of life. If such studies reveal that the backwardness of a class has ceased to exist, then that class should be removed from the orbit of backwardness. It should not be forgotten that national resources have to be so mobilized that the benefits of our welfare State reach the teeming millions even without reservations. A stage must reach when even without claiming protection of backwardness, an individual may be able to get non-discriminatory treatment and equality of justice.

DYNAMICS OF RESERVATION POLICY UNDER INDIAN CONSTITUTION : A WORKING PAPER

T. N. SHALLA

Underlying our Constitution is an egalitarian philosophy which makes no discrimination between individuals on grounds of caste, creed, race, religion, birth, sex, position and power. This is clearly echoed in the Preamble which states that WE, THE PEOPLE OF INDIA have solemnly resolved to secure to all citizens :

JUSTICE social, economic and political ;

LIBERTY of thought, expression, belief, faith and worship ;

EQUALITY of status and of opportunity.

The resolution aims at social reconstruction guaranteeing socio-economic justice through the mechanism of political democracy and individual liberty. This preambulatory concept of socio-economic justice has been translated by the framers into specific provisions in Part III (Fundamental Rights) and Part IV (Directive Principles of State Policy) of the Constitution. As observed by Granville Austin :¹

The Indian Constitution is first and foremost a social document. The majority of its provisions are either directly aimed at furthering the goals of the social revolution or attempt to foster this revolution by establishing the conditions necessary for its achievement. Yet despite the permeation of the entire Constitution by the aim of national renaissance, the core of the commitment to the social revolution lies in Parts III and IV, in the Fundamental Rights and in the

* Reader, Department of Law, University of Jammu, Jammu.

1. Granville Austin : THE INDIAN CONSTITUTION : CORNERSTONE OF A NATION, 1966, p. 50.

The purpose of the fundamental rights is to create an egalitarian society, to free all citizens from coercion or restriction by society and to make liberty available for all. The purpose of the directive principles is to fix certain social and economic goals for immediate attainment by bringing about a non-violent social revolution.

Directive Principles of State Policy. These are the conscience of the Constitution.

It was felt that a social reconstruction is a *sine qua non* for effective exercise of all other basic rights guaranteed in free India. However, the greatest impediment in this direction was the "social stratification" in the form of castes and classes wherein some sections of the society were vulnerable to exploitation by others. For historical reasons these unfortunate segments of Indian society were socially oppressed, economically condemned to live the life of penury and educationally coerced to learn and adopt the family trade or occupation. To undo this evil, a policy of "protective discrimination"² to the advantage of those who were too weak, socially, economically and educationally, was followed. In pursuance of this social policy, certain provisions were made in the Constitution giving 'favoured treatment' to various castes and classes. The policy was oriented to reconstruct and transform a medieval-hierarchical society into a modern egalitarian society based on individual achievement and equal opportunity for all regardless of caste, creed or religion.

The social policy of 'protective discrimination' in the form of reservations for certain castes and classes has not produced the desired results. In particular, the policy of reservations in the matter of employment and admission to educational institutions has generated a feeling of ill-will and social tension. The provisions avowedly transitory in nature are tending to acquire the status of entrenched provisions. More and more claims are being advanced for inclusion in the categories of "favoured treatment" constituencies. Is there something wrong with the policy formulation or its application? It is time we reassess the policy of "favoured treatment" in the form of reservations and make a working appraisal on the basis of thirty-four years' experience. Before we embark on our principal theme, it will be worthwhile to discuss some of the basic concepts. Such an analysis shall help us to achieve objectivity and appreciate the problem in its proper perspective.

2. Some writers call it as 'compensatory discrimination'.

I. Constitutional Mandate for a Social Reconstruction guaranteeing Socio-economic Justice

By now it has come to be recognised in all civilised countries that in order to sustain political freedom, justice social and economic is a *sine qua non*. A society of social decrepits and unequals, according to Mathew Arnold, materialises our upper classes, vulgarises our middle class and brutalises our lower class. In this process, the economic justice and social justice are linked and dependent on each other, since a society of social equals postulates a society of broad economic equality. Though the concept of socio-economic justice pervading the scheme of the Constitution does not conform to any doctrinaire character, the debates of the Constituent Assembly show that the framers have unequivocally laid down socio-economic justice as a goal to be achieved by the future governments in India. As a constitutional mandate, every government functioning within the constitutional framework is expected to strive to secure socio-economic justice for the citizens, but what means it should adopt to achieve the goal is left to each government to decide.

The connotation of the concept of socio-economic justice is elaborated by the statements of some members of the Constituent Assembly during the discussion on the Objective Resolution. According to one member,³ it clearly rejects the present social structure and the social *status quo*. It envisages far-reaching social change—social justice in the fullest sense of the term—through the mechanism of political democracy and individual liberty.⁴ Some members equated it with the commitment to socialism⁵ or “social-

3. M.R. Masani, C.A.D., Vol. I, p. 92.

4. *Id.*, p. 94.

5. Seth Govind Das, C.A.D., Vol. I, p. 108. Dr. B.R. Ambedkar, the Chairman of the Drafting Committee, also seems to favour a clear commitment to socialism to ensure socio-economic justice. Commenting on the phrase socio-economic justice in the Objective Resolution, he stated that “if the Resolution had a reality behind it and a sincerity.... I should have expected some provision whereby it would have been possible for the State to make economic, social and political justice a reality and I should have from that point of view expected the Resolution to state in most explicit terms that in order that there may be social and economic justice in the country, there would be nationalisation of industry and nationalisation of land. I do not understand how it could be possible for any future government which believes in doing justice, socially, economically and politically, unless its economy is a socialistic economy”. (C.A.D., Vol. I, p. 100)

isation of production".⁶ Referring to socio-economic justice contemplated in the Objective Resolution, Dr. S. Radhakrishnan said that "it intended to effect a smooth and rapid transition from a state of serfdom to one of freedom".⁷ He visualised a socio-economic revolution designed not only to bring about the real satisfaction of the fundamental needs of the common man, but to go much deeper and bring about a fundamental change in the structure of Indian society.⁸

What is aimed at is to achieve a social democracy in free India. It means a way of life which recognises justice, liberty, equality and fraternity as the principles of life. Pointing to its importance, Dr. Ambedkar said⁹:

How long shall we continue to live this life of contradictions? How long shall we continue to deny equality in our social and economic life? If we continue to deny it for long, we will do so only by putting our political democracy in peril. We must remove this contradiction at the earliest possible moment or else those who suffer from inequality will blow up the structure of political democracy which this Assembly has so laboriously built up.

The constitutional mandate for the achievement of socio-economic justice, as discussed above, has been phrased in Article 38¹⁰ which states:

- (1) The State shall strive to promote the welfare of the people by securing and protecting as effectively as it may a social order in which justice, social, economic, and political shall inform all the institutions of the national life.
- (2) The State shall, in particular, strive to minimise the inequalities in income and endeavour to eliminate inequalities in status, facilities and opportunities, not only amongst individuals but also amongst groups of people residing in different areas or engaged in different vocations.

6. N.V. Gadgil, C.A.D., Vols. II-III, p. 259.

7. *Id.*, p. 253.

8. *Id.*, p. 273.

9. C.A.D., Vol. XI, p. 979.

10. As amended by the Constitution (Forty-fourth Amendment) Act, 1978, which has inserted clause (2) of the article.

The State has been given a peremptory mandate not only to secure but to protect a social order ensuring socio-economic justice which aims at removing all inequalities and affording equal opportunities to all citizens in social affairs as well as economic activities.

II. Concept of Equality and Preferential Treatment

The idea of justice starts from the presupposition that men are by their very nature equal, and results in the postulate that all men shall be treated in an equal way. However, the eighteenth century presupposition that all men are equal is evidently wrong. According to sociologists, in any society during any given period of time there are five broad types of handicapped persons suffering from disability, viz. (1) physical, (2) mental, (3) social, (4) economic and (5) political disability. An ideal social order has to protect these categories of persons. Strict application of the doctrine of equality ignoring these disabled categories will result in inequality. Simple equality takes no account of the differences among the people whereas proportional equality recognises maintenance of a just proportion while taking into account the differences among people. Proportional equality involves classifying people by reference to commonness amongst individuals constituting the class and classification can be made according to merit or according to need resulting in different consequences. The former may be called material principle and the latter may be called compensatory principle. The Indian Constitution, while accepting the simple equality as a general norm has also incorporated the proportional equality in exceptional cases to achieve equality of status and of opportunity. This is in consonance with the modern realistic approach of a democratic State where the concept of equality connotes three specific meanings: (i) equal universal suffrage; (ii) social equality; and (iii) equality of opportunity.¹¹ The traditional concept of equality based on *laissez faire* liberalism has been sought to be replaced by the new equalitarian principle based on the following propositions:

11. See G. Sartori: DEMOCRATIC THEORY (Oxford Press, Calcutta), 1965, p. 335.

- (i) the distribution of goods and services primarily on the basis of merit is unfair unless each has a fair chance to compete on the basis of merit ;
- (ii) the use of meritocratic criteria without compensatory measures for those who suffer either from involuntary inequalities or from past invidious discrimination, simply perpetuates inequalities ; and
- (iii) that we must not only eliminate invidious discrimination but make affirmative efforts to assure equality of opportunity by adopting a variety of compensatory measures.^{11a}

The new equalitarian principle is not a total repudiation of the traditional concept of equality. It is that and something more. It implies action of two kinds : (1) stoppage of all discriminatory practices and (2) positive measures to correct accumulated consequences of past inequality.

In the ultimate analysis, there is no conflict between the two concepts of 'equality' and 'protective discrimination'. Equality as an ideal may prescribe discriminatory treatment as much as it can condemn it.

In our pluralistic society, not only is there the problem of equality and equal freedoms to all, but certain backward groups have to be given some preferential treatment so that economic and social justice operate in the whole society. It is in this context that the Constitution authorises the State to provide special benefits and preferences to certain sections of the population.

III. Constitutional Scheme of Social Reconstruction

The Constitution of India is a charter of a peaceful democratic social revolution. Such a social revolution is meant to get India out of the medievalism based on birth, religion, custom and community and reconstruct her social structure on modern foundations of law, individual merit and secular outlook. It is to give a socio-economic content to our freedom. Obsessed with this

11a. William T. Blackstone: "*Reverse Discrimination and Compensatory Justice*" in *SOCIAL JUSTICE AND PREFERENTIAL TREATMENT* (University of Georgia Press, Athens), 1977, p. 65.

desire, the framers of the Constitution laid down a scheme. The scheme operates in a twofold manner :

- (i) by treating every person as equal in the eyes of law and removing all forms of discrimination or disabilities ; and
- (ii) by undertaking special measures for the advancement of weaker sections of society by giving them adventitious aids and preferential treatment over others.

Articles 14 to 18 of the Constitution guarantee the right to equality to every citizen. Article 14 embodies the general principle of equality before law. In specific contexts the State is further forbidden to discriminate on grounds of race,¹² religion,¹³ caste,¹⁴ sex,¹⁵ place of birth,¹⁶ residence,¹⁷ descent,¹⁸ class¹⁹ and language.²⁰ Additional provisions outlaw untouchability²¹ and protect the citizen from certain kinds of discrimination by private persons and institutions.²² But in our society of uneven basic social structure, the doctrine of equality, howsoever comprehensive, would fail to afford an equality of opportunity in the real sense. So to make the right of equality meaningful, the Constitution makes a number of provisions to ameliorate the socio-economic conditions of socially, culturally and economically backward communities, or of those which are in a depressed state and to bring them up to a level comparable with the advanced sections of society. This policy is epitomized in the directive principle contained in Article 46, which states :

The State shall promote with special care the educational and economic interests of the weaker sections of the people,

12. Arts. 15(1), 16(2), 23(2), 29(2) and 325.

13. *Ibid.*

14. *Ibid.*

15. Arts. 15(1), 16(2) and 325.

16. Arts. 15(1) and 16(2).

17. Art. 16(2) but *cf.* Art. 16(3).

18. Art. 16(2).

19. Art. 23(2).

20. Art. 29(2) but *cf.* Art. 30(2).

21. Art. 17.

22. Art. 15(2) prohibits discrimination by private individuals in regard to use of facilities and accommodations open to the public. Arts. 28(3) and 29(2) forbid discrimination in private educational institutions.

and, in particular, of the Scheduled Castes and the Scheduled Tribes, and shall protect them from social injustice and all forms of exploitation.

The constitutional imperative and the mandate for securing and protecting a social order in which justice, social, economic and political shall inform all the institutions of the national life necessitated some form of 'preferential treatment' in favour of the weaker sections of society. In the broad compass of 'preferential treatment' policy we find special provisions for certain backward areas,²³ provisions guaranteeing minority rights,²⁴ provisions for the welfare of children and women²⁵ and provisions aimed at helping the weaker sections of the society.²⁶ But in the narrow sense of the term, the policy of 'preferential treatment' in the form of reservation has been made to ameliorate the conditions of the Scheduled Castes, the Scheduled Tribes and other backward classes. Not only are they favoured in benefits like housing, scholarships, etc., but exceptions have been carved to some of the non-discriminatory provisions of the Constitution to uplift these people. The scheme is justified on the ground that these sections are deficit in background socially and educationally which make them unable to compete on terms of equality. The whole scheme of preferences introduces a factor of historical balance or compensation: the backward are to be given a more than equal chance in order to overcome the deprivations and inequalities of the past.²⁷

IV. Constituencies of 'favoured treatment' under Protective Discrimination Scheme

The Constitution permits preferences in the form of reservations under protective discrimination provisions for three categories of people:

(1) Scheduled Castes,²⁸

23. Part X of the Constitution (Arts. 244-244-A).

24. Arts. 25, 26, 27, 28, 29 and 30.

25. Arts. 15(3), 24, 39(f), 42 and 45.

26. Arts. 15(4), 16(4), 19(5), 46, Part XVI of the Constitution (Arts. 330-342).

27. Gajendragadkar, J. in *General Manager v. Rangachari*, (1961) 2 SCJ 424, 431.

28. Arts. 15(4), 16(4), 330 and 332.

- (2) Scheduled Tribes,²⁹ and
- (3) Other Backward Classes.³⁰

The rationale for giving such a favoured treatment to these groups can best be appreciated if we study the Indian social structure in its historical perspective.³¹

These designated groups of 'favoured treatment' under the Constitution are specified as under :

(a) *Scheduled Castes*

Those among the weaker sections, the section belonging to depressed classes, suffered the most from untouchability and association with unclean vocations. Broadly speaking, these depressed classes are now known as the Scheduled Castes. Article 366(24) defined Scheduled Castes as under :

"Scheduled Castes" mean such castes, races or tribes or parts of or groups within such castes, races or tribes as be deemed under Article 341³² to be Scheduled Castes for the purpose of this Constitution.

In exercise of the powers conferred under clause (1) of Article 341, the President has made the Constitution (Scheduled

29. *Ibid.*

30. Arts. 15(4), 16(4).

31. For a detailed historical background of the social structure in India see Churve: *CASTES AND CLASSES IN INDIA* (1959); B.R. Ambedkar: *THE UNTOUCHABLES* (1948); Hulton: *CASTE IN INDIA: ITS NATURE, FUNCTION AND ORIGIN* (Oxford, 1963); K. Subba Rao: *SOCIAL JUSTICE AND LAW* (1974); A.N. Bhardwaj: *PROBLEMS OF SCHEDULED CASTES AND SCHEDULED TRIBES IN INDIA* (1979).

32. Art. 341 reads as under :

(1) The President may with respect to any State or Union Territory and where it is a State, after consultation with the Governor thereof, by public notification, specify the castes, races or tribes or parts of or groups within castes, races or tribes which shall for the purposes of this Constitution be deemed to be Scheduled Castes in relation to that State or Union Territory, as the case may be.

(2) Parliament may by law include in or exclude from the list of Scheduled Castes specified in a notification issued under clause (1) any caste, race or tribe or part of or group within any caste, race or tribe, but save as aforesaid a notification issued under the said clause shall not be varied by any subsequent notification.

Castes) Order, 1950³³ listing the Scheduled Castes in various States. The list was revised by Parliament subsequently.

(b) *Scheduled Tribes*

Those communities which are not fully assimilated in the general social order and the cultural autonomy of which needs to be safeguarded were classified as Scheduled Tribes. The tangible criterion for the specification seems to be isolation and distinct cultural background. Article 366(25) defined Scheduled Tribes as under :

“Scheduled Tribes” means such tribes or tribal communities or parts of or groups within such tribes or tribal communities as are deemed under Article 342³⁴ to be Scheduled Tribes for the purposes of this Constitution.

In exercise of the powers conferred under clause (1) of Article 342 the President has made the Constitution (Scheduled Tribes) Order, 1950³⁵ listing the Scheduled Tribes in various States. The list was revised by Parliament subsequently.

Under the Constitution, the President and Parliament are explicitly given broad and exclusive power to define these sche-

33. See also Constitution Scheduled Castes (Union Territories) Order, 1951; Constitution (Jammu & Kashmir) Scheduled Castes Order, 1956; Constitution (Dadra and Nagar Haveli) Scheduled Castes Order, 1962; Constitution (Pondicherry) Scheduled Castes Order, 1964; Constitution (Goa, Daman, Diu) Scheduled Castes Order, 1968 and Constitution (Sikkim) Scheduled Castes Order, 1978.

34. Art. 342 reads as under :

(1) The President may with respect to any State or Union Territory and where it is a State after consultation with the Governor thereof, by public notification specify the tribes or tribal communities or parts of or groups within tribes or tribal communities which shall for the purposes of this Constitution be deemed to be Scheduled Tribes in relation to that State or Union Territory, as the case may be.

(2) Parliament may by law include in or exclude from the list of Scheduled Tribes specified in a notification issued under clause (1) any tribe or tribal community or part of or group within any tribe or tribal community, but save as aforesaid a notification issued under the said clause shall not be varied by any subsequent notification.

35. See also Constitution Scheduled Tribes (Union Territory) Order, 1951; Constitution (Andaman and Nicobar Islands) Scheduled Tribes Order, 1959; Constitution (Dadra and Nagar Haveli) Scheduled Tribes Order, 1962; Constitution Scheduled Tribes (Uttar Pradesh) Order, 1967; Constitution (Goa, Daman and Diu) Scheduled Tribes Order, 1968; Constitution (Nagaland) Scheduled Tribes Order, 1970 and Constitution (Sikkim) Scheduled Tribes Order, 1978.

duled groups and the courts have refused to review the appropriateness of the criteria applied in determining these groups.³⁶ The inclusion in the list entitles the persons belonging to such groups to preferential treatment and privileges in the form of reservation of jobs and educational opportunities besides proportional seats in the legislatures. In the earlier phase, when the opportunities were many and aspirants few, the policy worked well. But now when there is stagnation of job opportunities and educational facilities in view of growing social demand, the consequent deprivation of many deserving candidates (who unfortunately do not belong to these groups) has led to social tension. A feeling has been generated that the inclusion in the scheduled list has become a vested interest. If an ultimate goal of having a classless and casteless society is to be attained, the lists of Scheduled Castes and Scheduled Tribes would have to be reduced from year to year and replaced in due course by a list based on criterion of income-cum-merit.³⁷ The unfortunate trend of expanding the lists,³⁸ obviously under communal pressures, is not a healthy sign. A bold step in reversing this trend is the need of the time. Such is the mandate of the Constitution and imperative for building an egalitarian society. The Advisory Committee for the revision of the lists of Scheduled Castes and Scheduled Tribes, appointed by the Central Government in 1965, had also suggested that more advanced communities in the lists be gradually descheduled and a deadline be fixed when these lists would totally be dispensed with in the interests of complete integration of the Indian population.

(c) *Other Backward Classes*

While classifying the weaker sections of the society which need special protection it was realised that the specified scheduled groups discussed above do not exhaust the list of all 'backward classes'. The Constitution, therefore, took note of what are called 'other backward classes' who were equally or may be somewhat less back-

36. *Parasram v. Shivchand*, AIR 1969 SC 597; *Bhaiyalal v. Harikishan Singh*, AIR 1965 SC 1557; *B. Basavalingappa v. D. Munichinappa*, AIR 1965 SC 1269.

37. Report of the Commissioner for the Scheduled Castes and Scheduled Tribes (1957-58).

38. The list of scheduled groups originally drawn in 1950 became twice as long in 1956 when it was revised.

ward than the Scheduled Castes and Scheduled Tribes. Unlike the scheduled groups, there is no clause defining these backward classes, nor is there any clear-cut method or agency for their determination. To facilitate the task of identifying the backward classes and laying down criteria for the purpose, Article 340³⁹ authorises the President to appoint a commission to investigate the conditions of the backward classes. In pursuance to this Article, the President appointed the Backward Classes Commission under the chairmanship of Kaka Saheb Kalelkar in January 1953. The Commission was required *inter alia* to

determine the criteria to be adopted in considering whether any sections of the people in the territory of India (in addition to the Scheduled Castes and Scheduled Tribes specified by notifications issued under Articles 341 and 342 of the Constitution) should be treated as socially and educationally backward classes; and in accordance with such criteria, prepare a list of such classes setting out also their approximate numbers and their territorial distributions.

The Commission submitted its report on March 30, 1955. A simple and clear-cut criterion could not be suggested by the Commission. After a consideration of social conditions in Indian society and the causes for the backwardness of a large section of the people, it adopted the following criteria for general guidance:⁴⁰

- (1) Low social position in the traditional caste hierarchy of Hindu society.

39. Art. 340 provides:

(1) The President may by order appoint a Commission consisting of such persons as he thinks fit to investigate the conditions of socially and educationally backward classes within the territory of India and the difficulties under which they labour and to make recommendations as to the steps that should be taken by the Union or any State to remove such difficulties and to improve their conditions and as to the grants that should be made for the purpose by the Union or any State and the conditions subject to which such grants should be made, and the order appointing such Commission shall define the procedure to be followed by the Commission.

(2) A Commission so appointed shall investigate the matters referred to them and present to the President a report setting out the facts as found by them and making such recommendations as they think proper.

(3) The President shall cause a copy of the report so presented together with a memorandum explaining the action taken thereon to be laid before each House of Parliament.

40. Report of Backward Classes Commission, Vol. I, pp. 46-47 (1956).

- (2) Lack of general educational advancement among the major section of a caste or community.
- (3) Inadequate or no representation in government service.
- (4) Inadequate representation in the field of trade, commerce and industry.

In the opinion of the Commission, the following could be included as 'socially and educationally backward classes':

- (i) Those nomads who do not enjoy any social respect and who have no appreciation of a fixed habitation and are given to mimicry, begging, jugglery, dancing, etc.
- (ii) Communities consisting largely of agricultural or landless labourers.
- (iii) Communities consisting largely of tenants without occupancy rights and those with insecure land tenure.
- (iv) Communities consisting of a large percentage of small landowners with uneconomic holdings.
- (v) Communities engaged in cattle-breeding, sheep-breeding or fishing on a small scale.
- (vi) Artisans and occupational classes without security of employment and whose traditional occupations have ceased to be remunerative.
- (vii) Communities, the majority of whose people do not have sufficient education and, therefore, have not secured adequate representation in government service.
- (viii) Social groups from among the Muslims, Christians and Sikhs who are still backward socially and educationally.
- (ix) Communities occupying low positions in social hierarchy.

Although the Commission tried hard to define 'backward classes' it could not give any exact definition of such a class. It appears that having considered several criteria as relevant in determination of backward classes, it ultimately decided to treat the status of caste as an important factor. And it is on that basis that

the Commission proceeded to make a caste-based list of backward communities.⁴¹ Interestingly, the Chairman of the Commission had second thoughts about such an approach after signing the Report.⁴² Three other members of the Commission had already expressed their doubts regarding caste as a basis of determining backwardness in their minutes of dissent to the Report itself. The Central Government did not feel satisfied about the approach adopted by the Commission in determining as to who should be treated as backward classes and rejected the recommendations. The then Union Home Minister, G. B. Pant, while presenting the Report to Parliament, said that "indisputable yardstick of measuring social and educational backwardness were wanting in the Report". The criterion of backwardness adopted by the Commission, according to him, apart from perpetuating caste distinctions entitled well-off sections of the backward classes to certain advantages at the cost of more deserving poor sections of the advanced classes. The Commission having failed to determine any objective criterion, the Government of India made further endeavours to devise some positive and workable criteria. As no acceptable conclusions could be arrived at, the Government decided not to issue any list of backward classes other than Scheduled Castes and Tribes. Instead instructions were issued to the State Governments to render every possible assistance and to give all reasonable facilities to the people who come within the category of backward classes according to their existing lists⁴³ and also to

41. The Commission prepared a list of as many as 2399 communities which were treated as 'socially and educationally' backward.
42. In his forwarding letter to the President, the Chairman, Kaka Saheb Kalelkar, wrote that income and not caste should determine backwardness. He disowned caste-based list of 'backward classes' prepared by the Commission over which he had presided on the plea that it would encourage caste-consciousness and would adversely affect the interests of Muslims and Christians who were converts from Hindu backward castes. He suggested that "if we eschew the principle of caste, it would be possible to help the extremely poor and deserving from all communities".
43. Various State Governments have framed their own lists of backward classes, the criterion for whose determination was challenged in many cases. For all practical purposes these State lists are framed on ad hoc basis and in this political expediency has played its own role. The criteria for selecting the beneficiaries under the category of backward classes have been subject of considerable judicial and scholarly attention. See *Balaji v. State of Mysore*, AIR 1963 SC 649; *Chitralekha v. State of Mysore*, AIR 1964 SC 1823; *N. K. Sharma v. State of Bihar*, AIR 1965 Pat 372; *State of Andhra Pradesh v. V. P. Sagar*, AIR 1968 SC 1369; *State of Kerala v. Jacob Mathew*, AIR 1964

(contd. on next page)

such others who can be considered as "socially and educationally backward". However, it was pointed out that while a State Government has discretion to choose its own criteria for defining backwardness, it would be better to apply economic tests than to go by caste consideration. In the light of the directions of the Central Government various State Governments appointed their own commissions and committees to investigate the conditions of backward classes and to evolve some definite criteria to identify "the socially and educationally backward" classes in their States.⁴⁴ More and more communities clamour to be included in the list and in this process the really deserving backward people are put to disadvantage. As a learned commentator remarked: "When a class is designated as backward, then even rich and well educated members of the class claim the privileges available; the more unfortunate members of the class are excluded and thus is frustrated the basic objective of the Constitution: viz., the amelioration of those who are really and factually weak and downtrodden".⁴⁵ Armed with the newly acquired economic and political strength, the backward classes started asserting their so-called constitutional right for reservations in jobs and education. Under the pressure, various State Governments have fixed reservation quotas for these groups ranging between 30 to 50 per cent.

Sudden spurt in the race for reservation quota on caste and communal basis led to social tension in the form of anti-reservation agitation in various parts of the country. This prompted the Central Government to think de novo in the matter. And accordingly the Second Backward Classes Commission under the chairmanship of Shri B.P. Mandal was appointed in 1978 in terms of

(contd. from previous page)

Ker 316; *State of Andhra Pradesh v. U.S.V. Balaram*, (1972) 1 SCC 660; *State of Kerala v. Krishna Kumari*, AIR 1976 Ker 54; *K. S. Jayasree v. State of Kerala*, (1976) 3 SCC 730; *T. N. Tiku v. State of Jammu & Kashmir*, AIR 1959 SC 1. See also N. Radhakrishnan: "Units of Social, Economic and Educational Backwardness case and Individual", 7 *JILI* 262 (1965); M. Galanter: "Protective Discrimination for Backward Classes in India", 3 *JILI* 39-69 (1961); Imam: "Reservation of Seats for Backward Classes in Public Services and Educational Institutions", 8 *JILI* 441 (1966).

44. For a background analysis of various State commissions/committees, see G.P. Verma: *CASTE RESERVATION IN INDIA: LAW AND THE CONSTITUTION*, 1980, pp. 38-50.

45. M. P. Jain: *INDIAN CONSTITUTIONAL LAW*, 2nd ed., 1970, p. 686.

Article 340 of the Constitution. The terms of reference of the Commission were :

- (1) To determine the criteria for defining the socially and educationally backward classes.
- (2) To recommend steps to be taken for the advancement of the socially and educationally backward classes of citizens so identified.
- (3) To examine the desirability or otherwise of making provision for the reservation of appointment of posts in favour of such backward class of citizens which are not adequately represented in the services of both the Central and the State Governments or Union Territory Administrations.
- (4) To present a report setting out the facts as found by them and making such recommendations as they think proper.

The Commission circulated a long questionnaire for the general public, met various delegations and toured different parts of the country. From the reports available, the following views were put forth before the Commission :

- (i) The caste alone should be criterion for determining backwardness.
- (ii) The caste alone should not be the criterion for determination of backwardness entitling a person to the reservations and other facilities. The criteria should be caste plus poverty.
- (iii) The caste should not be a factor in determining backwardness. Instead only economic factors should be taken into account.
- (iv) All reservations to be brought to an end.

In view of the extremely divergent viewpoints pressed from different sections of the population the Commission had to accomplish a stupendous and difficult task. Commenting on the difficulties of determining the criterion of backwardness faced by the earlier Commission, one learned writer says :⁴⁶

46. Majumdar, M.D. : "The Backward Classes Commission and its Task" in *SOCIAL WELFARE IN INDIA*, 1961, pp. 218-19.

There is general agreement that the criterion for backwardness must be objective, but the advantage of this agreement is materially reduced when one recalls that the concept of backwardness is itself qualitative and subjective perception, incapable of being quantitatively measured. The usual forms that backwardness takes in modern societies, for instance, poverty, lack of education, low standard of living and the like, to which statistics can be applied, cannot as such be accepted as criterion for backwardness by the Commission, because all these kinds of backwardness are so widespread in India that they set a vast problem of uplift for the entire nation which can be tackled only by the Union and State Governments in cooperation. No special inquiry is necessary to discover this fact.

The Commission submitted its report to the government on 31st December 1980. Like the earlier Commission, it has also adopted caste as the criterion for defining the 'socially and educationally backward classes', and accordingly finalised a list of 3743 castes (both Hindu and non-Hindu) grouped under the category of backward classes.⁴⁷ Besides recommending various steps to be taken for the advancement of the socially and educationally backward classes, the Commission has suggested the reservation to the extent of 27 per cent in central and state government services, public undertakings and educational institutions for backward classes. A fivefold scheme on the following lines is also suggested to ensure that the reservation policy would confer on the concerned sections the real benefits :

(i) Candidates belonging to backward classes recruited on

47. Taking 'caste' as a prime factor, the Commission applied the following procedure in finalising the list of Other Backward Classes :

(a) IN CASE OF HINDUS: Caste is adopted as the basis and then weighted social, educational and economic indicators have been applied to each caste group. A caste securing above 50% of points (above 11 out of 22) has been classified as 'socially and educationally backward'.

(b) IN CASE OF NON-HINDUS: The criteria for inclusion in the list is as under :

- (i) all untouchables converted to any non-Hindu religion ;
- (ii) occupational communities which are known by the name of their hereditary occupation and whose Hindu counterparts have been included in the list of Hindu Other Backward Classes.

By some supplementary criteria, primitive tribes and criminal tribes etc. as shown in the Registrar General of India's compilation of 1961 were also included in the list of Other Backward Classes.

- the basis of merit in open competition should not be adjusted against their reservation quota of 27 per cent.
- (ii) The reservation should also be made applicable to promotion quota at all levels.
 - (iii) Reserved quota remaining unfulfilled should be carried forward for a period of three years and de-reserved thereafter.
 - (iv) Relaxation in upper age limit for direct recruitment should be extended to these classes in the same manner as for Scheduled Castes and Tribes.
 - (v) A roster system for each category of posts should be adopted by the concerned authorities as was being done for Scheduled Castes and Tribes.

Though the report is yet under consideration of the government, it has found strong critics and admirers. The recommendations of the Commission have come in for scathing criticism at the hands of the Minorities Commission which feels that no constitutionally valid criteria to identify backwardness for the purpose of reservation have been established. It has advised the government against accepting these recommendations on the ground that caste cannot be the criterion for identifying backward classes. The Secretaries Committee, which was entrusted by the government with the study of the report, also rejected 'caste' as the basis for determination of backwardness and has preferred economic status as a more scientific criterion. On the other hand, there have been political threats for immediate implementation of Mandal Commission recommendations for reservation in favour of backward classes on 'caste' criteria. Some have even demanded reservation for religious groups.

It may be submitted that in our pluralistic society, identification of the backward classes is not easy. Backwardness in India, unlike other societies, is an attribute viewed not as regards individual but identified with community. Further, inequality in our society arises not merely as a consequence of poverty but also due to social distinctions. Identity of social status of a person means everything to him in terms of his family life, nobility, social status, etc. It is on this count that in judicial decisions

there is some confusion between the concept of caste and class, sometimes treating them as one and sometimes as different from each other. But in the changed circumstances, various forces are at work which increase the disassociation between caste and income, caste and occupation, and caste and education. This compels us to take account of the individual irrespective of his caste, for caste may not reflect the total range of his deprivation. The new legal order should therefore take an account of the status of an individual in his own right. However, it has to be appreciated that backwardness under consideration is a product of complex factors. It has been observed⁴⁸: "Social backwardness contributes to educational backwardness; educational backwardness perpetuates social backwardness; and both are often no more than the inevitable corollaries of extremes of poverty and the deadening weight of custom and tradition." Such a concept of backwardness cuts across the caste system, though sometimes it may include a whole sub-caste if the said sub-caste is comprised of wholly backward people and though sometimes the caste of a man gives an indication along with other factors of a person's backwardness.

Before we close the section, it may be submitted that criteria for identification of constituencies of 'favoured treatment' must be changed so as to give more assistance to the poor than to the rich among the backward classes including Scheduled Castes and Scheduled Tribes. As early as 1959, the Study Team on Social Welfare and Welfare of Backward Classes observed:⁴⁹

While still retaining the Schedules of Castes and Tribes for special assistance, an economic criterion should be applied within the groups of Scheduled Castes and Scheduled Tribes so as to ensure that more benefits go to those who are economically less advanced.... In fact, what is true particularly of Scheduled Castes and Tribes, generally holds good about the other Backward Classes as well.

Genuine interests of backward sections in the advanced classes must also be protected not only for the sake of equity but also to prevent backlash of policies in favour of the listed backward

48. *State of Kerala v. Jacob Mathew*, AIR 1964 Ker 316, 318.

49. REPORT OF THE STUDY TEAM ON SOCIAL WELFARE AND WELFARE OF BACKWARD CLASSES, 1959, p. 128.

classes. The policy should be reoriented to end the reservations as early as possible since the best measure for the success of this policy is its early dispensability.

V. Working Appraisal of the Policy of "Protective Discrimination" in the form of Reservations

The Constitution permits 'protective discrimination' in the form of reservation in the three specific areas: reservation of seats in the legislature, reservation of jobs, and reservation of seats in the educational institutions. Before we attempt the detailed analysis of these areas of reservation, the following general remarks with regard to the policy of reservation may be noted:

- (i) Except for reserved seats for scheduled groups in the legislatures, reservations are not mandatory but only permitted.⁵⁰
- (ii) Except in the case of political safeguards, the beneficiaries for 'favoured treatment' are entitled to special treatment as individuals and their membership in certain communities can be only used to identify them as deserving beneficiaries.
- (iii) The Constitution does not explicitly provide any maximum limitation on the quantum or extent of reservation in jobs and admission to educational institutions. However, during the years, a doctrine of constitutional limitation of 50% reservation has been expounded by the Supreme Court.⁵¹

50. In *Balaji v. State of Mysore*, AIR 1963 SC 469, 664, the Supreme Court described Arts. 15(4) and 16(4) as enabling provisions which did not impose any obligation, but merely left it to 'the discretion of the appropriate government to take suitable action, if necessary'.

51. *Ibid.* In fact, the Supreme Court has attempted to supply a constitutional limit to the extent of preferences, not on narrow technical construction of 'reservation', but on broader grounds of policy. The Mysore scheme reserved a total of 68% of seats in engineering and medical colleges as under:

(i) Scheduled Castes	15%
(ii) Scheduled Tribes	3%
(iii) Backward Classes	
(Backward Classes)	28%
(More Backward Classes)	22%
Total	50%
	68%

(contd. on next page)

(A) *Reservation of seats in the Legislature*

In order to create a politically homogeneous society, the framers of the Constitution rejected the system of communal representation⁵² and separate electorate and instead opted for universal adult franchise⁵³ and joint electorate.⁵⁴ But strangely enough, the founding fathers weakened the concept of political homogeneity by providing for reservation of seats in the legislature for the Scheduled Castes and Tribes. The departure from the general norm was justified on the ground that the peculiar position of these groups in the Indian political set-up makes it necessary to give them such a reservation.

Articles 330⁵⁵ and 332⁵⁶ provide for the reservation of seats for the Scheduled Castes and Scheduled Tribes in the House of the

(contd. from previous page)

The court held the scheme violative of Art. 15(4) on the ground that reservation to such an extent would be subverting the object of Art. 15(1). The court observed that special provisions for the backward classes must be within 'reasonable limits' and accordingly the interest of the weaker sections of society which were a first charge on the States, had to be adjusted with the interests of the community as a whole. While reluctant to set definite limits, the court indicated that "speaking generally and in a broad way, a special provision should be less than 50%, how much less than 50% would depend upon the relevant prevailing circumstances in each case" (p. 663).

Dr. Ambedkar, the Chief Draftsman of the Constitution, while defending Art. 16(4) before the Constituent Assembly, indicated that the reservation authorised was a minority of seats and gave the example of an aggregate reservation of 70% of posts as falling outside the power bestowed by the clause. (C.A.D., Vol. VII, p. 701)

52. Earlier, in 1947, while discussing the political safeguards of the minorities, the Constituent Assembly had decided for reservation of seats in the Union Legislature for Muslims, Scheduled Castes and Indian Christians; in all the State Legislatures for Muslims and Scheduled Castes; and for Indian Christians in Madras and Bombay. But by the end of 1948, it was felt that under the changed circumstances the reservation for religious communities was not desirable. However, by the Representation of the People (Amendment) Act, 1980 the concept of communal representation rejected by the Constituent Assembly was introduced with regard to the State of Sikkim. The amendment stipulated that of the 32 seats in the Sikkim Assembly, 12 will be reserved for Sikkimese of Bhutia-Lepcha origin, 2 for Scheduled Castes and 1 will be reserved for monasteries.
53. See Art. 326.
54. See Art. 325.
55. Art. 330 provides :

(1) Seats shall be reserved in the House of the People for—

(a) the Scheduled Castes;

(contd. on next page)

People (Lok Sabha) and the Legislative Assemblies of the States. These special provisions for the reservation of seats in the legislature were provided purely as a transitory measure. Initially the reservation was for a period of ten years. However, this arrangement was extended up to forty years by various constitutional

(*contd. from previous page*)

(b) the Scheduled Tribes except the Scheduled Tribes—

- (i) in the tribal areas of Assam;
- (ii) in Nagaland;
- (iii) in Meghalaya;
- (iv) in Arunachal Pradesh; and
- (v) in Mizoram; and

(c) the Scheduled Tribes in the autonomous district of Assam.

(2) The number of seats reserved in any State or Union Territory for the Scheduled Castes or the Scheduled Tribes under clause (1) shall bear, as nearly as may be, the same proportion to the total number of seats allotted to that State or Union Territory in the House of the People as the population of the Scheduled Castes in the State or Union Territory or of the Scheduled Tribes in the State or Union Territory or part of the State or Union Territory, as the case may be, in respect of which seats are so reserved, bears to the total population of the State or Union Territory.

(3) Notwithstanding anything contained in clause (2) the number of seats reserved in the House of the People for the Scheduled Tribes in the autonomous districts of Assam shall bear to the total number of seats allotted to that State a proportion not less than the population of the Scheduled Tribes in the said autonomous district bears to the total population of the State.

56. Art. 332 provides :

(1) Seats shall be reserved for the Scheduled Castes and the Scheduled Tribes, except the Scheduled Tribes in the tribal areas of Assam in Nagaland and in Meghalaya, in the Legislative Assembly of every State.

(2) Seats shall be reserved also for the autonomous districts in the Legislative Assembly of the State of Assam.

(3) The number of seats reserved for the Scheduled Castes or the Scheduled Tribes in the Legislative Assembly of any State under clause (1) shall bear, as nearly as may be, the same proportion to the total number of seats in the Assembly as the population of the Scheduled Castes in the State or of the Scheduled Tribes in the State or part of the State, as the case may be, in respect of which seats are so reserved, bears to the total population of the State.

(4) The number of seats reserved for an autonomous district in the Legislative Assembly of the State of Assam shall bear to the total number of seats in the Assembly a proportion not less than the population of the district bears to the total population of the State.

(5) The constituencies for the seats reserved for any autonomous district of Assam shall not comprise any area outside that district.

(6) No person who is not a member of Scheduled Tribe of any autonomous district of the State of Assam shall be eligible for election to the Legislative Assembly of the State from any constituency of that district.

amendments⁵⁷ as it was felt that the Scheduled Castes and the Scheduled Tribes needed the reservation for a longer period. The critics have deprecated the casual approach to the extension of legislative reservations.⁵⁸ The policy of legislative reservations, no doubt a bold imperative of equity and social justice, adopted at the time of the framing of the Constitution, and its continuation by periodical extensions demand a critical social enquiry. So far the extensions to legislative reservations have been mere rituals. As Baxi writes :⁵⁹

Surprisingly, the continuation of legislative reservations from time to time has not occasioned any national debate on the subject. The media has been altogether absent-minded about this. Even in Parliament the time taken up for discussion of a matter like this, which comes on its agenda only once in a decade, is far too little.

The periodical moves for extension of legislative reservations have been mainly motivated by political expediency though sought under the garb of political justice and protections to the scheduled groups. The situation has come to such an impasse that no political party, howsoever secular or radical it may be, can think of opposing this ritualistic game.⁶⁰ It seems that these transitory provisions may, in the course of time, become permanent.

A working appraisal of the provisions for legislative reservations clearly shows that they have not served the purpose intended by the founding fathers. The demand for reservation in legislatures was conceded on the ground that the scheduled groups need special political safeguards as it was not safe for their interests to rely upon joint political action in the legislature, which would be dominated by other politically advanced groups. It was hoped

57. See Constitution (Eighth Amendment) Act, 1960; Constitution (Twenty-third Amendment) Act, 1969; and Constitution (Forty-fifth Amendment) Act, 1980.

58. See Upendra Baxi: "Legislative Reservations", *INDIAN EXPRESS*, (New Delhi), Aug. 15 and 17, 1979, for a critical analysis of the policy of legislative reservations.

59. *Ibid.*

60. In fact, one of the election planks of all the major political parties in the general elections held in January 1980 was avowed declaration that they shall amend the Constitution to extend the legislative reservations.

that such a system of reservation will ensure the representations of these groups by their true representatives and thus involve them actively in the political life of the country. But the following glaring defects can be attributed to the existing system of legislative reservations :

1. It has failed to send genuine representatives from these scheduled groups to the legislature. It has been found that those who get elected on these reserved seats are mere 'appendages' and 'shadows' congenial to the dominant political parties. They belong more to these dominant parties than to their group.

2. The gap between these members and their group population is much wider. Further, a person once elected to the legislature tries to settle near the seat of power and away from his original moorings.

3. Among the scheduled groups only those politically conscious and dominant benefit from the scheme.

4. The scheme has not helped the growth of political groupings and parties among the scheduled groups. Their political leaders have chosen the strategy of working with and through the well-established political parties. In return of their personal gains, they seem to have lost their bargaining power. In such a situation they are unable to ensure effective implementation of any ameliorative policy or programme for their people.

5. Effectiveness of the legislative reservations has been greatly reduced by the abolition of double-member constituency in 1961.⁶¹ It has been found that reservation made some sense when there was plurality of seats.

6. The policy of legislative reservations has an opiate effect, it puts to sleep the instinct for social justice and dynamism that should come from an underprivileged class.

An objective assessment of the policy of legislative reservations warrants its early reversal. Since a total abolition may not be a

61. The immediate cause for this seems to be the defeat of late V.V. Giri by two tribal candidates in the Parvathipuram constituency in 1957.

realistic approach; a phased withdrawal as suggested by Shri M. R. Masani at the time of the first extension in 1959 deserves serious consideration. Under the arrangement one-third of the reservations would be withdrawn at each general election and within a period of fifteen years from the take-off date the system of reservation will come to a complete end. The other modifications to the system of legislative reservations during interim period, as suggested by Prof. Baxi, seem to be impracticable under the prevailing political conditions. However, the scheme could be made more meaningful by introducing the principle of rotation of the reserved constituencies. Accordingly, no parliamentary or assembly constituency should remain a reserved constituency for more than one term. Further, the constituencies which have been treated as reserved for more than ten years should be de-reserved. Such a modification shall help to achieve the process of social integration.

(B) Reservation of Jobs

The general principle adopted as regards services in India is merit and open competition. Article 16 guarantees to every citizen a right of equality of opportunity in matters relating to employment or appointment to any office under the State.⁶² It further provides that a citizen shall not be ineligible for or be discriminated against in respect of any employment or office under the 'State' on grounds only of religion, race, caste, sex, descent, place of birth, residence or any of them.⁶³

However, it was felt that strict adherence to merit would put the weaker sections of the society at a disadvantage. Accordingly, the provision was made for the reservation of jobs in terms of Article 16(4) which qualifies the non-discriminatory provisions⁶⁴ guaranteeing the equality of opportunity in matters of public employment. Special privileges through reservation and percentage quotas in recruitment and promotion in services have been given in pursuance to the provision. In order to complete the stupendous task of social reconstruction of building an egalitarian society,

62. Art. 16(1).

63. Art. 16(2).

64. Art. 16(1) and 16(2).

the framers of the Constitution thought it fair that people who were socially, economically and educationally backward should be given special concessions in the form of out-of-turn opportunities in recruitment as well as promotion. It was apprehended that these unfortunate people will not be able to compete on an equal footing with people who are better placed in life, socially advanced and educationally better qualified. The aim was to strike a balance between the fundamental rights of the individuals and social justice to the backward classes. All the same, the founding fathers were alive to the need for an efficient services cadre of calibre and potentiality. Accordingly, the Public Service Commissions⁶⁵ for the Union and the States are charged with the duty to ensure the appointment of suitable and fit persons to the civil services. But the State is enjoined to see that the backward sections of the society get due share in the service and thus become equal partners in the governance of the country. Article 335 provides :

The claims of the members of the Scheduled Castes and the Scheduled Tribes shall be taken into consideration, consistently with the maintenance of efficiency of administration, in the making of appointments to services and posts in connection with the affairs of the Union or of a State.

Further, Article 320(4) says that a Public Service Commission need not be consulted as regards the reservations of posts for backward classes, Scheduled Castes and Tribes under Article 16(4) or as regards the manner in which effect may be given to the provisions of Article 335.

The Constitution permits reservations of jobs in terms of Article 16(4) only if two conditions are satisfied, viz. (a) the class of citizens is backward and (b) that class is not adequately represented in the services under the 'State'. Both conditions must be fulfilled. Article 16(4) cannot be invoked merely because a class of citizens is not adequately represented in service. If that was so, "it would really exclude the backward classes from the benefit of Article 16(4) and confer the benefit only on a class of citizens

65. See Arts. 315 to 323.

who though rich and cultured, have taken to other avocations of life".⁶⁶

The judicial approach to the policy of job reservation has been liberal but cautious. It has been held that under Article 16(4) reservation can be made in government services not only at the stage of initial recruitment but also at the stage of promotion from a lower to a higher post or cadre.⁶⁷ The courts have gone even to the extent of holding that reserved posts could be filled either prospectively or retrospectively. But at the same time the courts, being alive to the danger of abuse of the power of reservation, have designed certain standards to ensure that the power is confined to the purpose of advancing the backward classes and not to hamper unduly other national interests.⁶⁸ They have set out limitations as regards the extent of preferences, the permissible modes of eliminating group-inequalities and the standards for selecting the legitimate beneficiaries of the preferential treatment schemes including reservations. Until the decision of the Supreme Court in *State of Kerala v. N. M. Thomas*⁶⁹, the courts had held that in the matter of public employment preferences could be given to the backward classes only by the method of 'reservation' under Article 16(4) which was an exception to the guarantee under Article 16(1). However, in *Thomas'* case, the Supreme Court broke new grounds to the interpretation of the equality provisions and upheld the authority of the State to adopt any methodology of protective discrimination besides reservation in the matter of public employment. The court upheld the scheme of Kerala State

66. *T. N. Tiku v. State of Jammu & Kashmir*, AIR 1967 SC 1283, 1286.

67. *General Manager, Southern Rly. v. Rangachari*, AIR 1962 SC 36. See 3 JILI 367 (1961) for a comment.

68. In *Balaji v. State of Mysore*, AIR 1963 SC 649, 664, the Supreme Court while referring to Art. 16(4) said :

There can be no doubt that the Constitution-makers assumed, as they were entitled to, that while making adequate reservation under Art. 16(4), care would be taken not to provide for unreasonable, excessive or extravagant reservation, for that would by eliminating general competition in a large field and by creating widespread dissatisfaction amongst the employees, materially affect efficiency. Therefore, like the special provision improperly made under Art. 15(4), reservation made under Art. 16(4) beyond the permissible and legitimate limits would be liable to be challenged as a fraud on the Constitution.

69. (1976) 2 SCC 310.

showing favour to Scheduled Castes and Scheduled Tribes employees by exempting them from the requirement of passing the departmental test for promotion in services. In order to help the promotion of employees belonging to scheduled groups, who were unable to get their promotions for failure to pass these departmental tests, the State Government incorporated Rule 13-AA in the Kerala State and Subordinate Services Rules, 1958 enabling the government to grant exemption to these employees for a specified period. Consequently an order was made under the rule exempting employees belonging to scheduled groups from passing departmental promotion tests for two years. As a result, thirty-four out of fifty-one posts were filled up by the members belonging to these groups without passing the test. One N. M. Thomas, a lower division clerk, was not promoted as an upper division clerk despite his passing the test. He filed a petition for a declaration that Rule 13-AA was violative of Article 16. The Kerala High Court declared the impugned rule invalid on the ground that it was beyond the permissible limits of Article 16(1). It opined that by virtue of the carry forward rule, the government had promoted sixty-two per cent of the clerks belonging to the backward groups and had made an uncalled for discrimination between the members of the same service. Moreover, the promotion of thirty-four out of fifty-one posts, according to the court, was not conducive to the efficiency of the administration as envisaged under Article 335. The Supreme Court by a majority of 5 : 2 upheld the impugned rule as valid. Four of the learned judges (Ray, C. J., Mathew, Krishna Iyer and Fazal Ali, JJ.) approved the classification made by the rule as permissible under Article 16(1) and Beg, J. justified it under Article 16(4) as constituting a 'conditional' or 'partial' reservation in favour of backward groups. The majority ruling rejected the well-settled theory of the exceptional nature of Article 16(4) and in doing so it impliedly overruled judicial limitations set out earlier regarding reservation policy. According to the majority, Article 16(1) permitted legislative classification as did Article 14 and as such the 'State' could adopt any methodology by making a reasonable classification to ensure adequate representation of these downtrodden employees. The 'reservation' was one of the methods of such classification under Article 16(4).

But later decisional emphasis in *Akhil Bharatiya Shoshit Karamachari Sangh v. Union of India*⁷⁰ by Krishna Iyer, J. seems to have retrieved the situation created by *Thomas* case partly.

A long line of decided cases had made it clear that the 'State' is permitted to make a provision for the reservation of appointments of posts in favour of any backward classes of citizens which, in its opinion, are not adequately represented in the services. The beneficiaries under the power are to be ascertained by the 'State'. However, the criterion used for such determination must be objective and is justiciable. Even when the conditions of backwardness are satisfied, the court would further examine whether the percentage of reservation for backward classes is reasonable. If the reservation is found to be excessive, unreasonable or extravagant, it would be open to challenge as a fraud on the Constitution. In addition, the courts shall also demand greater circumspection while upholding any scheme of reservation of responsible public offices in the interest of efficiency of administration. This seems to be the underlying rationale of the provision of reservation of jobs provided under the Constitution. However, a working appraisal of the policy clearly shows that the State has been misusing its powers for extraneous considerations. In addition to reservation for the scheduled groups, reservation for other backward classes have been made far in excess of the permissible limits. The unhealthy competition among the States to ensure job reservations, motivated by political considerations, has created a feeling of ill-will and animosity among various sections of the society. It seems that a vested interest has developed among politicians to exploit the label of backwardness to foster benefits to certain communities and castes. Such a policy of job reservation disregards merit and talent and regulates recruitment and promotion on the basis of the caste label alone irrespective of the economic status of the claimant thus resulting in group rivalries and prejudices. Blanket power of the State to adopt any methodology other than reservation, as expounded by the majority in the *Thomas* case, has further worsened the matter. Pointing out the

70. (1981) 1 SCC 246.

dangers inherent in such an interpretation, Khanna, J. observed that an authorisation of preferential treatment under Article 16(1) would vest the State, under the garb of classification, with the power of treating sections of population as favoured classes of citizens for public employment. Article 16(2) may also not prove very effective because the prohibitions contained therein may be circumscribed by mentioning grounds other than those specified in the clause. If inroads were allowed into the equality concept beyond those permissible under Article 16(4), the "ideals of supremacy of merit, the efficiency of services and the absence of discrimination in sphere of public employment would be the obvious casualties".⁷¹

The policy of job reservation for weaker sections of the society, though laudable, has bedevilled the Indian scene for a long time. Instead of resorting to indiscriminate job reservation, the youth of the backward classes should have been educated on sound lines during the last thirty-seven years since independence so as to make them self-supporting and fully equipped to face the competition. Pampering of groups and factions for political reasons by resort to reservation of jobs is an unhealthy and endless process. The correct solution lies in giving all possible incentives and concession in school and college education to the children of the weaker sections of society for preparing them to face open competition.

(C) *Reservation of Seats in Educational Institutions*

Unlike Article 16(4) which specifically provided for reservation of jobs, there was no provision in the Constitution which permitted reservation of seats in educational institutions. But in pursuance to the directive embodied in Article 46 to promote with special care the educational and economic interests of the weaker sections of the people, various State governments started making reservations of seats in the technical and medical institutions. Such a reservation was held as invalid and violative of Articles 15(1) and 29(2).⁷² While examining the underlying social policy the

71. *State of Kerala v. N. M. Thomas*, (1976) 2 SCC 310, 401.

72. *State of Madras v. Smt. Champakam Dorairajan*, AIR 1951 SC 226, wherein the court struck down the government order which allocated seats in educational institutions to the various communities in proportion to the population they bore to the total population of the State.

court found that except for reservation in services, the framers did not contemplate giving any special treatment to the backward classes. The basis for the conclusion was found in the express provision in Article 16(4) for the reservation of seats in public services for backward classes and the absence of such a provision in Article 29(2) (which relates to admission to the educational institutions) and Article 15 (which is a general provision prohibiting discrimination on certain grounds). The court recognised the obligation of the State under Article 46 to promote the welfare and interests of the weaker sections of the people but considered the underlying object of Articles 15 and 29(2) so sacrosanct that the promotion of welfare of such classes was not to be by way of undermining it. To overcome such difficulty, the Constitution (First Amendment) Act, 1951 was passed which added a new clause to Article 15. The clause reads as under :

Nothing in this article or in clause (2) of Article 29 shall prevent the State from making any special provision for the advancement of any socially and educationally backward classes of citizens or for the Scheduled Castes and the Scheduled Tribes.

The wording 'any special provision' in Article 15(4) gives the State great leeway in prescribing the method of operation of preferential treatment for the advancement of weaker sections of society. Special measures such as housing, scholarships, land distribution, health benefits are being taken under this power. These benefits are given over and above what is being done under general programmes of development in different fields. Under the general power of preferential treatment conferred on the 'State', the State governments have reserved seats in the educational institutions for the weaker sections of the society.

The reservation of seats in educational institutions under Article 15(4) and of jobs under Article 16(4) has received a uniform interpretation by the courts.⁷³ In order to ensure that the power conferred under Article 15(4) enabling reservation of seats in educational institutions is not misused, the courts have struck down various State directives and rules. While in some cases, the

73 See *M.R. Balaji v. State of Mysore*, AIR 1963 SC 449; *T. N. Tiku v. State of J & K*, AIR 1967 SC 1283; and *Chhotey Lal v. State*, AIR 1979 All 135.

beneficiaries were not determined on an objective criterion, in others the reservation was excessive or unreasonable. While upholding genuine schemes for the promotion of educational and economic interests of the weaker sections of the people, the courts have been alive to the need for providing opportunity to the meritorious and competent students belonging to other sections. By and large the courts have been generally liberal in construing the power of reservation of seats in educational institutions. The reservation of seats for the children of defence personnel, freedom fighters or political sufferers⁷⁴ or for those who come from hilly areas,⁷⁵ outstanding sportsmen,⁷⁶ has been approved by the courts.

The existing policy of reservation of seats in educational institutions for Scheduled Castes, Scheduled Tribes and Backward Classes has generated social tension in the form of mistrust and animosity among the various sections of the society.⁷⁷ Since the number of candidates seeking admission to educational institutions (especially engineering, medical and other technical institutions) far exceed the number of seats available, the meritorious and deserving candidates who but for the reservation policy would have been admitted feel dejected. Added to this is the ad hoc approach adopted by various State governments in selecting the beneficiaries under the scheme and unreasonable quota put under reservation. A working appraisal of the policy shows that benefits have been conferred on the people on extraneous considerations other than backwardness. It is alleged that in order to woo various groups of the society the States have made reservations on communal and caste considerations disregarding repeated dicta disapproving such a procedure. Conceding the need to uplift the weaker sections of the people, measures other than reservation of seats in educational institutions should be taken. In their enthusiasm to woo more and more sections of the population the

74. *D.N. Chanchala v. State of Mysore*, (1971) 2 SCC 293.

75. *State of Uttar Pradesh v. Pradip Tandon*, (1975) 1 SCC 267.

76. *State of Kerala v. R. Jacob Mathew*, AIR 1964 Ker 316.

77. 'The 1980 Gujarat riots are a manifestation of the havoc that reservation politics is playing on the social fabric. The Ahmedabad medicos' resentment over the extension of reservation to postgraduate education snow-balled into a community-wide caste warfare. The agitators decided to strive for abolition of reservation from every field.'

State governments have lowered the standards of admissions to various courses at great risk to the interests of the nation. The 1980 decision of the Madhya Pradesh Government⁷⁸ to waive the restriction of securing even minimum qualifying marks for the Harijans and Adivasi students to the medical colleges is a clear pointer in this direction. Legal pundits in India must be already scanning through the pages of the U. S. Supreme Court judgment in *Regent of the University of California v. A. Bakke*⁷⁹, a case of reverse discrimination since the policy of reservation has created "new untouchables".⁸⁰

Conclusions

"A society is as strong as its weakest sections. Therefore to protect and promote interests of such sections is to stabilize and strengthen the society."⁸¹ As a national policy, the framers of the Constitution provided for special measures to ameliorate the conditions of the weaker sections of society. The policy of 'protective discrimination' has been used to mitigate the existing inequalities between various sections of the society and to accomplish a social reconstruction ensuring socio-economic justice to all. The policy had its critics right from the beginning, but lately there is a growing concern for its indefinite continuation. The working appraisal of the policy of "preferential treatment" in the

78. The Madhya Pradesh Government relaxed the minimum qualifying marks in the Pre-Medical Test (PMT) for the Scheduled Castes and the Scheduled Tribes in 1980 to fill up all 216 of 720 seats in the State's medical colleges reserved under this category—even students securing 5 to 10 per cent marks in PMT were admitted to the medical colleges under these categories. It may be mentioned here that the minimum qualifying marks for students appearing in the general category is 50% but sometimes they have to get as much as up to 70 per cent to secure admission.

The ill-conceived decision, while lowering the standard of medical education, is bound to cause a lot of heartburning and desperation among the deserving students.

79. 98 SCR 2733 (1978).

80. In his address to the 71st meeting of the Inter-State Board for Anglo-Indian Education, Mr. Frank Anthony called upon educationists to give thoughts to the disastrous consequences of the politically inspired policy of runaway reservations for the Scheduled Castes and Scheduled Tribes and backward classes in educational institutions to the virtual exclusion of others, who are becoming the "new untouchables".

81. Mohd. Ghouse: "Judicial Control of Protective Discrimination", 11 *JILI* 371 (1969).

form of reservation discussed earlier clearly shows that the policy has failed to achieve the desired objective underlying it. On the contrary, a vested interest has developed in it for extraneous considerations. The policy devised to build a classless and casteless society has instead perpetuated distinctions based on caste and class and thereby hampered the accomplishment of social reconstruction. Conceived as a progressive measure to benefit the historically neglected and exploited sections of society, the policy of reservation has been turned into an instrument of party politics. The policy as implemented, enlarged and perpetuated has almost completely distorted the original philosophy. It has on the one hand created a vested interest in backwardness and on the other resulted in what is seen as a reverse discrimination.

The existing policy needs fundamental and drastic changes since it has failed to bring about the desired social reconstruction, nor has it helped to ameliorate the socio-economic conditions of the weaker sections. Instead of resorting to reservation and thus creating distrust and tension between various segments of society, a timebound programme to uplift all the weaker sections is needed. Experience and working of three decades show that we have not touched even the tip of the iceberg.⁸²

No doubt the uplift of weaker sections of the society is the first charge on the nation. But reservation is not the panacea. The biggest shortcoming of this policy is that it creates a differential system of access to privileges, and thus encroaches upon the right of many a better and deserving individual. Instead special efforts to help all weaker sections should be made. In this endeavour, the existing categorisation of beneficiaries on the basis of caste, tribe or community should be discarded and all persons deserving help should be provided with maximum facilities as a matter of their legitimate right.

It is submitted that the State should adopt a policy of reservation of facility to build up human material and thereafter let the best be selected to serve the nation. What we need is 'compensatory action' and not 'preferential treatment'.

82. As per the government version, 316 million Indians lived below the poverty line in 1980.

PROTECTIVE DISCRIMINATION : CONSTITUTIONAL PRESCRIPTION AND JUDICIAL PERCEPTION

B. ERRABBI

The conflict between the claims of the individual to enforce his constitutional right to formal or legal equality on the one hand and the concern of the State on the other to accord preferential treatment to the weaker sections of the society, and in particular, to the Scheduled Castes and Scheduled Tribes who constitute more than one-fifth of India's total population, in order to make the fundamental right to equality really meaningful to them has presented many challenges not only to the government but also to the judiciary. The preferential treatment accorded to these weaker classes of Indian citizens in matters of admission to educational institutions and of employment in State services has sparked off violent mass opposition from the upper classes in some of the States of the Indian union. The constitutional contours and conspectus of the concept of protective discrimination deserve a close look at this juncture. The crucial questions that call for answers are : Do Articles 14¹ and 16(1)² embody only the concept of formal equality?

* Reader, Faculty of Law, University of Delhi, Delhi.

1. Article 14 reads :

The State shall not deny to any person equality before the law or equal protection of the laws within the territory of India.

2. Article 16 states :

(1) There shall be equality of opportunity for all citizens in matters relating to employment or appointment to any office under the State.

(2) No citizen shall, on grounds only of religion, race, caste, sex, descent, place of birth, residence or any of them, be ineligible for, or discriminated against in respect of, any employment or office under the State.

* * * *

(4) Nothing in this article shall prevent the State from making any provision for the reservation of appointments or posts in favour of any backward class of citizens which, in the opinion of the State, is not adequately represented in the services under the State.

* * * *

Are Articles 15(4)³ and 16(4)⁴ exclusive repositories of the notion of benign discrimination? What are the criteria envisaged by the Constitution to identify the socially, educationally and economically backward classes of citizens? What are the constitutionally envisaged criteria for the classification of Scheduled Castes and Scheduled Tribes? What is the constitutionally permissible extent of reservation envisaged under Articles 15(4) and 16(4) of the Constitution? In this presentation an attempt is made to examine all these questions in the light of the relevant constitutional provisions and their judicial exposition.

A. The Constitutional Spectrum of the Concept of Equality

The Constitution of India sets out in the Preamble the basic constitutional goals of the nation.⁵ These goals are sought to be achieved by a twofold means embodied in Parts III and IV of the Constitution. While Part III (Fundamental Rights) embodies and guarantees certain individual freedoms, Part IV (Directive Principles of State Policy) lays down important non-justiciable positive directives and commands the State to implement these directives⁶ so that the constitutional goals enshrined in the Preamble are realised. It may be mentioned, in passing, that Part III does

3. Article 15 declares:

(1) The State shall not discriminate against any citizen on grounds only of religion, race, caste, sex, place of birth or any of them.

* * * *

(3) Nothing in this article shall prevent the State from making any special provision for women and children.

(4) Nothing in this article or in clause (2) of Article 29 shall prevent the State from making any special provision for the advancement of any socially and educationally backward classes of citizens or for the Scheduled Castes and the Scheduled Tribes.

4. *Supra*, note 2.

5. The goals are:

To constitute India into a *Sovereign Socialist Secular Democratic Republic* and to secure to all its citizens:

Justice, social, economic and political;

Liberty of thought, expression, belief, faith and worship;

Equality of status and of opportunity;

and to promote among them all *Fraternity* assuring the dignity of the individual and the unity and integrity of the Nation.

6. Article 37 expressly states:

The provisions contained in this Part shall not be enforceable by any court, but the principles therein laid down are nevertheless fundamental in the governance of the country and it shall be the duty of the State to apply these principles in making laws.

not, by and large, impose on the State positive duties obligating it to take affirmative actions to help the realisation of the guaranteed freedoms, but it imposes negative duties, demanding from the State only inaction. As explained by Justice Mathew in his separate but concurring judgment in the *Thomas* case:⁷

Fundamental Rights as enacted in Part III of the Constitution are, by and large, essentially negative in character. They mark off a world in which the government should have no jurisdiction. In this realm, it was assumed that a citizen has no claim upon government except to be let alone.

In consonance with the above constitutional scheme, the preambular promise of equality of status and of opportunity has been concretised and clothed with flesh and blood by the provisions of Articles 14, 15 and 16 read with Articles 38, 46 and 335 of the Constitution. Thus, Article 38 obligates the State among other things to minimise the inequalities in status, facilities and opportunities not only amongst individuals but also amongst classes of individuals living in the country. In this context a special constitutional obligation is imposed on the State by Article 46 to promote with special care the educational and economic interests of the weaker sections of the people, and in particular, of the Scheduled Castes and the Scheduled Tribes.⁸ In order to enable the State to discharge the constitutional obligation imposed by these directives, the right to equality embodied in Articles 14 and 16(1) should be given a very liberal interpretation so that the right is made really meaningful to the Scheduled Castes and Scheduled Tribes and other backward classes of the Indian citizenry.

It may be appreciated that the constitutional goal of equality enshrined in the Preamble of the Constitution is wide enough in its import to embrace both the concepts of formal and substantive equality. Its import is also wide enough to obligate the State to bring about substantive equality by according, if necessary, favoured or preferential treatment to those who

7. *State of Kerala v. N. M. Thomas*, (1976) 2 SCC 310, 343.

8. Article 46 reads:

The State shall promote with special care the educational and economic interests of the weaker sections of the people and, in particular, of the Scheduled Castes and the Scheduled Tribes, and shall protect them from social injustice and all forms of exploitation.

deserve and need it. Strict adherence to the notion of formal equality would not only mean aggravation and perpetuation of the existing inequalities, but also a total negation of the preambular promise of equality of status and of opportunity. Therefore the idea of substantive equality would and should necessarily admit of rational classification for preferential treatment in favour of Scheduled Castes and Scheduled Tribes with the consequent discrimination against the privileged classes in the society. The preferential treatment implicit in the idea of substantive equality may relate, *inter alia*, to the reservation of appointments in the State services or of seats in educational institutions. Again, when the State seeks to make reservations in favour of a particular weaker section of the society like the Scheduled Castes and Scheduled Tribes, it, in effect, decides to sacrifice the claims of the more privileged, even if it should mean sacrifice of the claims of more meritorious in favour of the less meritorious. Furthermore, the idea of protective discrimination enjoins the State not only to make reservations in favour of the socially and educationally backward classes, Scheduled Castes and Scheduled Tribes, but also not to close to the members of these communities the doors of the merit or open competition. Therefore, the main question in this context is: what are the constitutional limitations on the power of the State to enforce substantive equality? This takes us to the relevant constitutional provisions and their judicial treatment.

B. The Constitutional Contours of the Concept of Protective Discrimination

Article 14 guarantees the principle of equality in general terms. This is exemplified and particularised in Articles 15 and 16. It has been rightly held that Article 14 is the genus of the guarantee of equality of which Articles 15 and 16 are the species.⁹ Article 14, which has to be interpreted in the light of Articles 38 and 46, seems to enjoin the State to ensure substantive or factual equality. Accordingly, this provision confers on the State a wide latitude to provide for protective discriminatory measures with

9. *State of Kerala v. N. M. Thomas*, (1976) 2 SCC 310, 331, 347, 351 (Per Ray, C. J., Mathew, Beg and Fazal Ali, JJ. respectively).

minimum of judicial interference. It is judicially well established that the permissible judicial scrutiny under Article 14 is confined to the ascertainment of the reasonableness of the impugned legislative classification on the anvil of the twofold test: (i) the classification must be founded on an intelligible differentia which distinguishes persons or things that are grouped together from others left out of the group, and (ii) the differentia must have a rational relation to the object to be achieved by the statute in question.¹⁰ The classification should have "a reasonable basis free from artificiality and arbitrariness embracing all and omitting none naturally falling into the category".¹¹ An important question in this context is: does the judicial scrutiny extend beyond to the ascertainment of the reasonableness of the criteria on which the classification is based and of the object which is sought to be achieved by the law. This question has been answered in the negative. Justice Chandrachud (as he then was) in the *Triloki Nath Khosa* case observes:¹²

Judicial scrutiny can . . . extend only to the consideration whether the classification rests on a reasonable basis and whether it bears nexus with the object in view. It cannot extend to embarking upon a nice or mathematical evaluation of the basis of classification, for were such an inquiry permissible it would be open to the courts to substitute their own judgment for that of the legislature. . . . on the need to classify or the desirability of achieving a particular object.

As is evident from the above observation, under Article 14 the State's choice of criterion on which the legislative classification is based and the object of the law are immune from judicial scrutiny.¹³ The court can only examine whether the basis of classification bears a rational nexus to the object of the law. Inherent in this position is the risk of the State's power being used for the creation and perpetuation of discrimination based

10. See *State of W. B. v. Anwar Ali Sarkar*, AIR 1952 SC 75; *Rama Krishna Dalmia v. S. R. Tendolkar*, AIR 1958 SC 538; In re *Special Courts Bill*, (1979) 1 SCC 380; *R. K. Garg v. Union of India*, (1981) 4 SCC 675 and *A.B.S.K. Sangh (Rly.) v. Union of India*, (1981) 1 SCC 246.

11. *A.B.S.K. Sangh (Rly.) v. Union of India*, *Id.*, p. 287 (per Krishna Iyer, J.).

12. *State of J & K v. Triloki Nath Khosa*, (1974) 1 SCC 19, 33.

13. In this context, see P. K. Tripathi: *Some Insights into Fundamental Rights*, pp. 94-95 and 100-101 (1972).

upon religion, race, caste, sex or place of birth. This possibility is obviated by the incorporation of Article 15(1).

Article 15(1) prohibits the State from classifying citizens for the purpose of discriminatory preferential treatment "on grounds only of religion, race, caste, sex, place of birth or any of them". This prohibition does not, however, inhibit the State when it seeks to accord preferential treatment to "socially and educationally backward classes of citizens or . . . Scheduled Castes and Scheduled Tribes". Such a compensatory State action is justified and saved under Article 15(4). The only mandatory requirement of this provision that has to be complied with is that the permissible preferential treatment should be in favour of socially and educationally backward classes or Scheduled Castes and Scheduled Tribes. Therefore, leaving aside for the moment the case of the Scheduled Castes and Scheduled Tribes, the scope of judicial review under Article 15(4), it is submitted, is only to ascertain whether or not the State's determination of socially and educationally backward classes of citizens is factually correct. If the State's determination is held to be factually correct, then the classification of socially and educationally backward classes becomes unimpeachable no matter what criteria have gone into the basis of classification. This is so because the purpose or the scope of judicial review is not to question or scrutinise the validity or feasibility of the means or criteria adopted by the State for the purpose of identifying socially and educationally backward classes. It is submitted that this position is implicit in the very import of Article 15(4) which has been rightly held to be an exception to Article 15(1)¹⁴. Since Article 15(4) operates as an exception to Article 15(1), it, in effect, enables the State to do the very thing which would otherwise be prohibited in terms of Article 15(1)¹⁵. This means that whenever the State seeks to enforce the substantive equality in terms of Article 15(4), it can disregard the prohibition imposed by Article 15(1) and effect discrimination solely on any one or more of the grounds prescribed thereunder.

14. *Balaji v. State of Mysore*, AIR 1963 SC 649, 657.

15. Marc Galanter: *Competing Equalities—Law and the Backward Classes in India*, 1984, pp. 189 and 314.

Thus, without going into the sociological ramifications of choosing "caste" as a criterion, it is submitted that under Article 15(4) the State can rely upon the criterion of caste for the identification of the socially and educationally backward classes of citizens.¹⁶ This view also derives support from the import of Article 15(3) which enables the State to make, inter alia, special provision for women and children.¹⁷ It is axiomatic that a special provision in favour of women can only be effected by using "sex" as the sole criterion. Further, under Article 15(4) classification of Scheduled Castes cannot be effected unless the State first relies upon the criterion of "religion", a prohibited ground under Article 15(1), as these communities are the result of peculiar social phenomena of the Hindu religion. This is clear from clause (3) of the Constitution (Scheduled Castes) Orders of 1950 and 1951 which provides that no person who professes a religion other than Hinduism and Sikhism shall be deemed to be a member of Scheduled Castes.

C. Reservation of Seats in Educational Institutions

(i) *Criterion of Caste : Constitutional Validity*

While this is and ought to be the import of Article 15(4), the judicial decisions and *dicta* on the subject of reservations of seats in educational institutions tell us a different story. For example, in *Balaji's* case the Supreme Court declared that the use of "caste" as the sole criterion of classification of socially and educationally backward classes of citizens was violative of Article 15(4) of the Constitution. Justice Gajendragadkar (as he then was) observed :¹⁸

We are satisfied that the classification of the socially backward classes of citizens made by the State proceeds on

16. *Id.* p. 194. For a contrary opinion, see P. K. Tripathi: *Some Insights into Fundamental Rights*, pp. 203 and 204 and Parmanand Singh: *Equality, Reservation and Discrimination in India*, pp. 181 and 182 (1982). See also Samuel M. Witten: "Compensatory Discrimination in India: Affirmative Action as a means of combating Class Inequality", 21 *C.J.T.L.* 379-80 (1983).
17. See *Yusuf v. State of Bombay*, AIR 1954 SC 321, 322. It may be noted that the immunity accorded to women in respect of the offence of adultery under S. 497 of the Indian Penal Code, 1860 is nothing but a benefit conferred on women on the basis solely of sex.
18. *Balaji v. State of Mysore*, AIR 1963 SC 649, 660.

the consideration only of their castes without regard to the other factors which are undoubtedly relevant. If that be so, the social backwardness of the communities to whom the impugned order applies has been determined in a manner which is not permissible under Article 15(4) and that itself would introduce an infirmity which is fatal to the validity of the said classification.

The above observation has found favour with the Supreme Court in several of its subsequent decisions.¹⁹ This disheartening judicial approach to the interpretation of Article 15(4), it is submitted, is not convincing for more than one reason.

First, it may be noted that clauses (1) and (4) of Article 15 have a limited purpose and import. It may also be appreciated that Article 15(1) does not prohibit altogether every kind of discrimination which is an inevitable consequence of any legislative classification envisaged under Article 14. What it does prohibit is the classification and the resultant discrimination on the basis of certain grounds specified therein. This prohibition cannot operate on the compensatory State action when it is taken in terms of Article 15(4). Therefore, classification of socially and educationally backward classes which is based solely upon caste would not be inconsistent with the import of Article 15(4), provided that the citizens classified as socially backward are in fact backward.

Secondly, it has to be appreciated that Article 15(4) is an enabling and saving provision. It is not an invalidating provision. Its purpose is limited. Its operation is invoked only for the purpose of saving the compensatory State action from the prohibition of Article 15(1). Therefore, the invocation of the operation of Article 15(4) is always conditional upon the State action being violative of Article 15(1). If this condition is satisfied, the inconsistent State action would be saved if it is in conformity with the requirements of Article 15(4). If it is not so saved the action would be unconstitutional not because it is

19. See *Chitrallekha v. State of Mysore*, AIR 1964 SC 1823; *State of A. P. v. P. Sagar*, AIR 1968 SC 1379; *Janki Prasad v. State of J & K*, (1973) 1 SCC 420 and *State of U. P. v. Pradeep Tandon*, (1975) 1 SCC 267; *Rajendran v. State of Madras*, AIR 1968 SC 1012; *Periakaruppan v. State of Tamil Nadu*, (1971) 1 SCC 38; AIR 1971 SC 2303 and *State of A.P. v. Balaram*, (1972) 1 SCC 660.

violative of Article 15(4) but because it is violative of Article 15(1). This point can be elucidated with the help of two examples. Take the case of compensatory State action which classifies the beneficiaries on the basis of their caste, economic and educational backwardness and occupation. The classification in this case does not attract the scope of Article 15(1)²⁰ and, therefore, the question whether or not the classification is constitutional does not depend upon the import of Article 15(4), but depends upon the scope of Article 14. Think of another compensatory State action which proceeds to classify socially and educationally backward classes of citizens on the basis solely of caste. This caste-based classification *ex facie* violates Article 15(1) and the only relevant question in the context of the scope of Article 15(4) is whether or not the classification is saved or justified under that provision. The classification would be saved under that provision if the State's determination as to who are socially and educationally backward classes of citizens is held to be factually correct. If it is not held to be factually correct the classification would become invalid not because it is violative of Article 15(4) but because it is violative of Article 15(1). Therefore, the court's view in *Balaji's* case that the caste-based classification of socially and educationally backward classes is impermissible under Article 15(4) is to misconstrue its scope.

Lastly, it is submitted that the constitutionally permissible compensatory State action is neither confined to, nor restricted by, the terms of Article 15(4). In this sense, Article 15(4), like Article 16(4), is not the sole repository of the notion of protective discrimination. If the State wants to advance the interests of the socially and educationally backward classes of citizens, it has two alternative courses open to it. One is to comply with the requirements of Article 15(4) as indicated above. The other is to take recourse to Article 14 and to classify socially and educationally backward classes of citizens on the basis not only of their caste but also of their economic condition and occupation. In the second case the validity of the classification does not become violative of Article 15(1) and consequently, it need not be

20. *Air India v. Nargesh Meerza*, (1981) 4 SCC 335, 362.

salvaged. Therefore, the logical conclusion is that if a particular legislative classification is not hit by Article 15(1), its validity would automatically become examinable under Article 14. In spite of this constitutional position, to observe that factors other than caste are relevant for the classification of socially backward classes under Article 15(4) is not only to mistake the scope of that provision but also to ignore the vital role of Article 14. Article 14 has been given its due place in the constitutional scheme by Grover, J. in *Chitra Ghosh v. Union of India*²¹, when he observed:²²

We are unable to see how Article 15(1) can be invoked in the present case. The rules do not discriminate against any citizen on grounds only of religion, race, caste..... This brings us to Article 14.

The problem of identification of Scheduled Castes and Scheduled Tribes itself, it may be appreciated, would ultimately hinge around the criteria of caste and race or descent respectively. In their case the Constitution itself makes the necessary classification with a special mandate for the advancement of their economic and educational interests. However, it does not prescribe any criteria on which the identification of the Scheduled Castes and Scheduled Tribes can be effected. The constitutional definitions of "Scheduled Castes"²³ or "Scheduled Tribes"²⁴ are not helpful in this regard. Consequently, different judges have expressed

21. (1969) 2 SCC 228.

22. *Id.*, p. 38.

23. Article 366(24):

"Scheduled Castes" means such castes, races or tribes or parts of or groups within such castes, races or tribes as are deemed under Article 341 to be Scheduled Castes for the purpose of this Constitution.

Article 341(1):

The President may with respect to any State or Union Territory, and where it is a State, after consultation with the Governor thereof, by public notification, specify the castes, races or tribes or parts of or groups within castes, races or tribes which shall for the purposes of this Constitution be deemed to be Scheduled Castes in relation to that State or Union Territory, as the case may be.

24. Article 366(25):

"Scheduled Tribes" means such tribes or tribal communities or parts of or groups within such tribes or tribal communities as are deemed under Article 342 to be Scheduled Tribes for the purposes of this Constitution.

different views²⁵ on the issue whether the Scheduled Castes are "castes" within the ordinary meaning of that expression. It is submitted that in the context of the Indian society which is predominantly caste-ridden it is unrealistic to say that Scheduled Castes are not meant to refer to "castes". The Mandal Commission has recommended "caste" criterion for the identification of backward classes in the country. It has rightly observed that "caste" is the cornerstone of the structure of the Hindu society and the root cause of their social, educational, economic and political backwardness.²⁶

(ii) *Extent of Reservations : Constitutionally Permissible Limits*

The constitutionally permissible limits of reservation of seats in educational institutions are the product of judicial interpretation. In *Balaji's* case the Supreme Court declared that Article 15(4), being in the nature of an exception to the main rule embodied in Article 15(1), cannot be allowed to eat away the main rule and that, therefore, reservations in favour of socially and educationally backward classes of citizens must be less than 50% of the total available seats.²⁷ In this case the order of the government of the State of Mysore, reserving 68% of seats in the State's engineering and medical colleges in favour of socially and educationally backward classes of citizens including Scheduled Castes and Scheduled Tribes, was declared unconstitutional as it was thought that such excessive reservation amounted to a fraud on the Constitution.²⁸ It is respectfully submitted that the view taken by the Supreme Court with regard to the permissible extent of reservations of seats in educational institutions is untenable. It may be appreciated that Article 15(4) has been held to be an exception to Article 15(1). If so, it is submitted, there is no reason why the exception should be limited to 50% or any other arbitrary figure preferred by the judges. So long as Article 15(4)

25. Article 342 is similar to Article 341 in its import, Mathew, Krishna Iyer and Gupta, JJ. in *State of Kerala v. N.M. Thomas*, (1976) 2 SCC 310, 337, 348, 367, 404, respectively. See also *A.B.S.K. Sangh (Rly.) v. Union of India*, (1981) 1 SCC 246, 311 (per Justice Krishna Iyer).

26. Report on the Backward Classes Commission, pp. 1, 39, 41 and 61-62 (1980).

27. *Balaji v. State of Mysore*, AIR 1963 SC 649, 663.

28. *Ibid.*

is an exception, there is no escape from the conclusion that the exception enables the State to do the very thing that is prohibited to it in the main provision. There cannot be any half-way houses in this context. Therefore, it is submitted that the import of Article 15(4) does not permit any limitation on the extent of permissible reservations of seats in educational institutions in favour of socially and educationally backward classes or Scheduled Castes and Scheduled Tribes.

D. Reservation of Posts in State Services

This aspect is dealt with under Article 16. Article 16(1) represents one particular aspect of the guarantee of the general principle of equality enshrined in Article 14.²⁹ It ensures to all citizens equality of opportunity in matters relating to employment in the State services. Unlike Article 14 which is negative in form, Article 16(1) lays emphasis on the affirmative action of the State. According to Justice Mathew in the *Thomas* case, equality of opportunity as dealt with in Article 16(1) means something more than mere formal equality.³⁰ It means differential treatment of persons who are unequal. In spite of the difference in form and language, Article 16(1) is similar to Article 14 in its import and, therefore, whatever has been said in the context of the scope of Article 14 would, *mutatis mutandis*, apply to the scope of Article 16(1).

Clauses (2) and (4) of Article 16 should have the same relation to Article 16(1) as clauses (1) and (4) of Article 15 have to Article 14. Article 16(2) is similar to Article 15(1) and imposes similar prohibition on the State. Article 16(4) removes this prohibition and enables the State to make reservation of appointments or posts in favour of any under-represented as well as unrepresented backward classes of citizens. The State shall, however, have due regard to the administrative efficiency, whenever it seeks to accord preferential treatment in favour of the members of Scheduled Castes and Scheduled Tribes.

In *Thomas*³¹ the Supreme Court examined the import of clauses (1) and (4) of Article 16 as well as their interrelationship.

29. *State of Kerala v. N. M. Thomas*, (1976) 2 SCC 310.

30. *Id.*, p. 343 (Per Mathew, J.).

31. *Ibid.*

The majority court held that Article 16(1) is similar to Article 14 in its import³², that clause (4) is not an exception to clauses (1) and (2) of Article 16, but is a clarificatory or an explanatory provision.³³ It is a facet of Article 16(1) as it fosters and furthers the idea of equality of opportunity with special reference to underprivileged and deprived classes of citizens.

Justice Khanna, who delivered the main dissenting judgment, held that Article 16(1) is not similar to Article 14 in its import. According to him Article 16(1) only embodies the notion of formal or legal equality and therefore there is no scope for spelling out any concept of preferential treatment from the language of clause (1) of Article 16.³⁴ His lordship held that Article 16(4) is an exception to Article 16(1) and that it is exhaustive of the provision for preferential treatment for members of backward classes.³⁵ The learned judge would not read the notion of preferential treatment into Article 16(1) mainly for three reasons. One is that the liberal approach adopted in respect of the scope of Article 14 "would in the very nature of things be not apt in the context of Article 16".³⁶ The second is that the operation of

32. *Ibid.* Ray, C.J. while concurring with the majority observed : (at pp. 333 and 338).

Article 16(1) and (2) gives effect to equality before law guaranteed by Article 14 and to the prohibition of discrimination guaranteed by Article 15(1)... If classification is permissible under Article 14, it is equally permissible under Article 16, because both the articles lay down equality.

Similar observations were made by the other majority judges.

33. *Ibid.* Ray, C.J. observed (at p. 335) :

Article 16(4) clarifies and explains that classification on the basis of backwardness does not fall within Article 16(2) and is legitimate for the purpose of Article 16(1).

In a similar vein Krishna Iyer, J. observed (at p. 368) :

True, it may be loosely said that Article 16(4) is an exception but closely examined, it is an illustration of constitutionally sanctified classification.

Similarly, Justice Mathew observed (at p. 347) :

If equality of opportunity guaranteed under Article 16(1) means effective material equality then Article 16(4) is not an exception to Article 16(1). It is only an emphatic way of putting the extent to which equality of opportunity could be carried viz., even up to the point of making reservation.

34. *Id.*, p. 395.

35. *Ibid.*

36. *Id.*, p. 399.

Article 16(2) cannot be an effective check on the possible abuse of the State's power of classification as it "can be circumvented by prescribing grounds other than those" mentioned therein.³⁷ The third and the most important reason is that the reading of the idea of preferential treatment in Article 16(1) would render Article 16(4) wholly superfluous and redundant.³⁸

The first two reasons advanced by the learned judge for his disinclination to read the notion of protective discrimination into Article 16(1) do not stand close scrutiny. There is no reason why Article 16 cannot, like Article 14, be construed liberally to permit the State's efforts to combat inequality by conferring favoured treatment to the deserved. Again, it is a mistake to suppose that the scope of Article 16(1) depends upon the effectiveness of the prohibition imposed under Article 16(2).

The third reason advanced by the judge merits serious consideration. This brings us to the consideration of the real import of Article 16(4). Like Article 15(4), Article 16(4) has a very limited role to play. It is an enabling and saving provision. Its only function is to salvage the State's compensatory protection measure from the reach of Article 16(2) when its classification is based solely on the criteria laid down in that provision. It is respectfully submitted that Article 16(4) is not robbed of its limited role even if the notion of protective discrimination is read into Article 16(1). This provision would lose its significance and become superfluous only if Article 16(2) were deleted from the Constitution. Therefore, so long as Articles 16(2) and 15(1) continue to be part of the Constitution, Articles 16(4) and 15(4) will continue to command significance, howsoever limited it may be.

However, the minority view in *Thomas* that Article 16(4) is exhaustive of the provision for protective discrimination is not convincing. It is no doubt true that the minority judges derived their support from the decision in the *Balaji* case in which the

37. *Id.*, p. 396.

38. *Id.*, p. 399. See also the observations of Mohd. Ghous: 12 ANNUAL SURVEY OF INDIAN LAW 248 (1976) and 13 ANNUAL SURVEY OF INDIAN LAW 274 (1977).

court held that Article 15(4), which is similar to Article 16(4), is an exception to Article 15(1) which is similar to Article 16(2). It is submitted that by analogy the minority view that Article 16(4) is an exception to Article 16(2) is unexceptionable. However, to hold that Article 16(4) is an exception to Article 16(1), which is similar to Article 14, is to ignore the material fact that Article 14 was not within the scope of judicial review in the *Balaji* case.³⁹ Article 16(4) cannot, in the nature of things, be an exception to Article 16(1) just as Article 15(4) cannot be an exception to Article 14. Therefore, it is submitted that Article 16(4), like Article 15(4), is not an exclusive repository of the notion of protective discrimination.

The majority judgment is also not free from criticism. The majority view⁴⁰ that Article 16(4) is an explanation to Article 16(2) is *prima facie* unconvincing. It is so because the import of Article 16(4) which is derogatory to that of Article 16(2) can never be illustrative of that provision. Therefore it is an exception to the general rule in Article 16(2).⁴¹

(i) *Backward Classes and the Criteria for Identification*

This aspect has already been examined in the context of the discussion of reservation of seats in educational institutions. The only aspect that requires consideration here is the import of the expression "Backward Classes" in Article 16(4) which is comprehensive enough to comprehend not only the socially and educationally backward classes⁴², and Scheduled Castes and Scheduled Tribes,

39. Although the consideration of Article 16(4) was not germane to the scope of judicial review the court made a mention of it. *Balaji v. State of Mysore*, AIR 1963 SC 649, 662.

40. *State of Kerala v. N. M. Thomas*, (1976) 2 SCC 310.

41. *A. B. S. K. Sangh (Rly.) v. Union of India*, (1981) 1 SCC 246, 289 (per Krishna Iyer, JJ.).

42. However, in *Janki Prasad v. State of J & K*, (1973) 1 SCC 420, Palekar, J. speaking for the court, observed (at pp. 432, 433).

It is now settled that the expression "backward class of citizens" in Article 16(4) means the same thing as the expression "any socially and educationally backward class of citizens" in Article 15(4). In order to qualify for being called a 'backward class citizen' he must be a member of a socially and educationally backward class. It is social and educational backwardness of a class which is material for the purposes of both Articles 15(4) and 16(4).

which are contemplated under Article 15(4), but also other backward classes not contemplated in that provision. It may be noted that, unlike Article 15(4) which insists on the communities classified as backward being backward both socially and educationally, Article 16(4) only requires the classification of backward classes to be based upon the criterion of backwardness which may be social, educational, economic or political. The question whether the classification of socially, educationally, economically or politically backward classes of citizens can be caste-based has already been answered in the affirmative. This is all the more so in view of the fact that "what are called backward classes are... nothing but a collection of castes".⁴³

Since the expression "Backward Class" used in Article 16(4) is wide enough to include in its scope Scheduled Castes and Scheduled Tribes, they are also entitled to claim its benefits. Their identification poses no problem as they have been constitutionally classified. In the context of the classification of Scheduled Castes and Scheduled Tribes, the only questions that require answers are: can the classification of Scheduled Castes and Scheduled Tribes be caste-based? And can the validity of such classification be judicially scrutinized? For reasons already mentioned, answer to the first question must be in the affirmative. As regards the second question as already submitted, the scope of the judicial scrutiny is very limited.

(ii) *Extent of Reservations*

Unlike the judicial limitation imposed on the extent of reservations of seats in educational institutions, the ceiling that is sought to be imposed on the constitutionally permissible extent of reservation of posts or appointments in State services is not wholly a production of judicial innovation, but stems from Article 335 which expressly subordinates the claims of the Scheduled Castes and Scheduled Tribes for appointment in State services to the need for the maintenance of efficiency of administration.⁴⁴ It may be

43. Parliamentary Debates, 1951, Vol. XII-XIII (Part II), p. 9006.

44. Article 335 states:

The claims of the members of the Scheduled Castes and the Scheduled Tribes shall be taken into consideration, consistently with the maintenance of efficiency of administration, in the making of appointments to services and posts in connection with the affairs of the Union or of a State.

noted that while the ceiling on the extent of reservation of posts in favour of Scheduled Castes and Scheduled Tribes flows from the import of Article 335, the limitation on the extent of reservation of jobs in favour of backward classes other than Scheduled Castes and Scheduled Tribes is a product of judicial innovation. Curiously, although Article 16(4) enables the State to effect reservation of jobs in State services in favour of all backward classes of citizens, maintenance of efficiency of administration is constitutionally contemplated only in the case of reservation effected in favour of Scheduled Castes and Scheduled Tribes. The pertinent questions in this regard are : why is this distinction made between reservations of public posts in favour of Scheduled Castes and Scheduled Tribes and those in favour of other backward classes of citizens? Does it mean that the maintenance of efficiency of administration is not contemplated in the context of reservations in favour of backward classes other than Scheduled Castes and Scheduled Tribes? What is the exact constitutional intent in this regard?

It is of immense interest to note that in the draft Article 296⁴⁵ of the Constitution prepared by the Drafting Committee, it was provided that "the claims of all minority communities shall be taken into consideration, consistently with the maintenance of efficiency of administration, in the making of appointments of services.....". The expression "the claims of the Scheduled Castes and Scheduled Tribes" did not find a place in that text. It was during the course of the debate on the draft provision in the Constituent Assembly that Dr. Ambedkar moved an amendment which sought to restrict the scope of the provision to members of the Scheduled Castes and Scheduled Tribes.⁴⁶ This amendment was finally adopted by the House without realising that a serious lacuna was being created in the constitutional scheme of the doctrine of protective discrimination enshrined in Article 16. The members of the Constituent Assembly who participated in the discussion did not visualise the draft Article 296 as a limitation on the power of the State to effect reservations in favour of backward

45. See B. Shiva Rao: *THE FRAMING OF INDIA'S CONSTITUTION*, Vol. III, pp. 631-32.

46. 10 C.A.D. 229.

classes of citizens envisaged under Article 16. This will be evident from a perusal of the Constituent Assembly Debates. Shri Guptanath Singh, member of the Constituent Assembly from Bihar, moved an amendment to the amendment moved by Dr. Ambedkar to replace the expression "the claims of the members of the Scheduled Castes and Scheduled Tribes" with the expression "the claims of the members of the Scheduled Castes and Scheduled Tribes and such other castes who are educationally and socially backward" in the draft Article 296. But unfortunately he withdrew it at the last moment. His speech on the floor of the House does not indicate that he was appreciative of the restrictive import of that provision.⁴⁷ This can also be seen from the speech of Shri H. V. Kamath who, while commenting on the amendment moved by Dr. Ambedkar, observed:⁴⁸

I only wish to say this much, Sir, that with the passing of this article today the only class of people of this country who might be lightly [*sic*] apprehensive will be... those who are called the backward class of citizens. They perhaps will be somewhat apprehensive about their future, as to what their share will be as regards the services in the State, but I wish to dispel their misapprehension by referring to the Fundamental Right in Article 10; clause (3) of Article 10 (now Article 16) provides... when this is guaranteed to them, no backward class of citizens need be apprehensive. If there is no representation for them in the services they can take the government to task on that account. I think this would be an adequate safeguard for them so far as their share in the services is concerned. I hope that this Article 10 guarantees that right to them, and so they need have no dispute or quarrel with the article before the House today.

Since the legislative intent is not clear as to the scope of Article 335, it is necessary to examine, briefly, the judicial dicta in this regard. According to judicial opinion, it may be noted, there is, in effect, a twofold limitation on the power of the State to make reservations of public posts in favour of backward classes of citizens. The first limitation is derived from Article 16(4) which is in the nature of an exception to Article 16(2). Article 16(4) being an exception, the reservation contemplated under Article 16(4) cannot be excessive or extravagant. The other limitation is rooted

47. *Id.*, pp. 240-42.

48. *Id.*, pp. 243.

in Article 335 which commands the State to take into consideration the claims of Scheduled Castes and Scheduled Tribes for appointments, subject to the maintenance of efficiency of administration. It may be appreciated that while the limitation on the extent of reservation of public posts in favour of Scheduled Castes and Scheduled Tribes comes from two sources, i.e., Articles 16(4) and 335, the limitation on the extent of reservations in favour of backward classes other than Scheduled Castes and Scheduled Tribes stems from one source only, i.e., Article 16(4). It is heartening to note that in spite of the restrictive import of Articles 16(4) and 335, the Supreme Court has not limited the extent of reservations in favour of Scheduled Castes and Scheduled Tribes to the 50% or less than 50% rule laid down in the *Balaji*⁴⁹ and *Devadasan*⁵⁰ cases. The Supreme Court is prepared to uphold even 67% reservations in a particular year provided that they do not substantially exceed 50% of the total number of posts in the concerned department. To quote Justice Krishna Iyer in *A.B.S.K. Sangh (Rly.) v. Union of India*⁵¹:

All that we need say is that the Railway Board shall take care to issue instructions to see that in no year shall SC and ST candidates be actually appointed to substantially more than 50% of the promotional posts. Some excess will not affect as mathematical precision is difficult in human affairs but substantial excess will void the selection.

Another important dimension of the discussion which is closely related with the main one is to look for answers to two or more questions which are: Is the State bound to bring about substantive equality? Is there a fundamental right to protective discrimination? A look at some of the relevant constitutional provisions like the Preamble and Articles 38 and 46 would make it clear that the State has an imperfect duty to ensure substantive equality. The State's effort should be facilitated in the performance of its duty by a liberal judicial interpretation of the scope of Articles 14, 16(1) and 16(4) and 15(4). Answer to the question as to whether there is a fundamental right to protective discrimination cannot, however, be given in the affirmative. If such a right and the

49. *Balaji v. State of Mysore*, AIR 1963 SC 649.

50. *Devadasan v. Union of India*, AIR 1964 SC 179.

51. *A.B.S.K. Sangh (Rly.) v. Union of India*, (1981) 1 SCC 246, 296.

corresponding obligation were read into Articles 14 and 16(1), it would reduce Articles 16(4), 15(4) and 46 into superfluity. This is so despite the fact that the Supreme Court has read some of the directive principles into the fundamental rights.⁵²

Conclusions

1. The import of Articles 14 and 16(1) is not restricted to the concept of formal or legal equality. It is comprehensive enough to include the concept of substantive equality also.

2. There is, however, no fundamental right to protective discrimination in the sense of imposing an affirmative duty on the State to ensure substantive equality.

3. Articles 15(4) and 16(4) are not the exclusive repositories of the notion of compensatory discrimination. Articles 14 and 16(1) are the dominant sources of the principle of protective discrimination.

4. Article 15(4) is an exception to Article 15(1) and is an explanation to Article 14. Likewise, Article 16(4) is an exception to Article 16(2) and is an explanation, and not an exception to, Article 16(1).

5. Articles 15(4) and 16(4) being exceptions to Articles 15(1) and 16(2) respectively, they can even eat away the main rule embodied in the main provisions.

6. The role of Articles 15(4) and 16(4) is limited to salvaging the State's action classifying socially, educationally and economically backward classes based solely upon the criteria prohibited under Articles 15(1) and 16(2).

7. Caste-based classification for the identification of backward classes and Scheduled Castes is constitutionally permissible.⁵³ Besides, in the context of the structure of the Indian society, caste-based classification correctly reflects the social reality.

52. *Id.*, p. 308 (Per Chinnappa Reddy, J.).

53. *State of A.P. v. Balaram*, (1972) 1 SCC 660; *Rajendran v. State of Madras*, AIR 1968 SC 1012; and *Periakaruppan v. State of Tamil Nadu*, (1971) 1 SCC 38.

Justice Krishna Iyer observes:

The social dynamics of equality involve the strategy of equalisation in a society of stratification through castification. [(1981) 1 SCC 246 at 291.]

8. In the context of reservation of posts in State services the dictates of Article 335 cannot be ignored.

9. Since the doctrine of protective discrimination as embodied in Articles 14, 15(4), 16(1) and 16(4) is an enabling measure which is not temporary in nature, it is for the State to decide as to when the measure is to be withdrawn. It may be submitted that the time has not as yet come for its withdrawal as the nation has yet to go a long way in the direction of ensuring substantive equality to the backward classes in the country.

PROBLEM OF UNTOUCHABILITY AND FORMER UNTOUCHABLES

DR. P. T. BORALE

The Constitution of India abolished 'untouchability' stating in Article 17 that 'Untouchability is abolished and its practice in any form is forbidden' and that "(T)he enforcement of any disability arising out of 'untouchability' shall be an offence in accordance with law."

Six years after the formation of the Republic of India, the Untouchability (Offences) Act was enacted by Parliament. Neither this Act nor the Constitution has defined the word 'untouchable'. Justice Mr. Shreenivas Rau observed that the subject-matter of Article 17 is not untouchability in its literal or grammatical sense but the practice as it had developed historically in this country. We should make an attempt to understand the genesis of untouchability. Gandhiji defined an "untouchable" as under :

An untouchable is outside the place of respectable society. He is hardly treated as a human being. He is an outcaste, hurled into an abyss by his fellow beings occupying the same platform. The difference, therefore, is somewhat analogous to the difference between Heaven and Hell.

Gandhiji aptly described the caste Hindu villages as villages in Heaven and the untouchables living in the localities outside these villages 'untouchable ghettos' as Hell.

To find a definition acceptable according to legal standards, recourse has to be had to the sources of Hindu Law, namely, *Srutis*, *Smritis*, Customs and Usages obtained in the Hindu community from times immemorial.

Manusmriti defines the repositories of *Dharma* (Law) as *Srutis*, *Smritis*, *Sadachara* and good conscience, and we also have the custom and usages observed in the community. A clear proof of usage will outweigh the written text of law. Hindu usages and

* Ex.-Principal, Law College, Bombay and ex-Mayor, Bombay.

customs regarding the untouchable either as a *sudra* or a *panchama* are well-known. The disabilities suffered by these people included unseeability, unteachability, unseatability, doing socially degraded work, and living in only or near burial grounds. Kane's *History of Dharmashastra* refers to untouchables as *panchamas* beyond the pale of the four *varnas* of the Hindu social polity. The privy council in *Sankaralinga Nandan v. Raja Rajeshwara Dorai*¹ refers to pariahs included in the list of Scheduled Castes as being regarded as agricultural slaves. They were considered as being outside the pale of the caste system of Hindus which consisted of, according to the Code of Manu, the *Dwijas* (the twice born), namely, *Brahmins* controlling law, judiciary and education, *Kshatriyas* controlling the power in land and in administration, and *Vaishyas* controlling trade, commerce and industry. Hindu *Dharmashastra* enumerated the *panchamas* as including *Hinas* by birth, *Vratyas*, *Mlechhas*, and those who did not perform their *samskaras*. The *Dwijas* by making rules treated the *non-Dwijas* (*sudras* and *panchamas*) as slaves, just in the same manner as the whites in America ruled over the African black people as being slaves. They were regarded as article of property held, bought and sold as such.² Banaji states that in ancient India, the slaves born in particular castes were held in hereditary bondage. Unlike the Negroes in America, a slave was not, in ancient India, capable of attaining the status of a servant or a labourer. He was assigned unclean work. His remuneration, even if it were so termed, consisted of chewed food (*ucchistamanna*), torn clothes (*jirnani vasnani*), husks of food (*pulakaschaiva dhanyanam*), torn bedding (*jirnachaina paricchada*). Several disabilities imposed on these untouchables since ancient times were still legally permissible during the British regime in one form or the other. Thus it has been observed that the dwellings of *chandals* and *svapakas* should be outside the village. They being *appapatras* must always wander from place to place. They are ordained to live in the following places: burial grounds, under or around trees, in the mountains, in the woods. The *Dwijas* should not have social intercourse with these people. Even entry in the villages during night time was prohibited to them. They were assigned the work of removing dead bodies of those having no

1. *Sankaralinga Nandan v. Raja Rajeshwara Dorai*, (1907-08) 35 IA 176, 178.

2. 19 How US 15 Edn 692.

relations. Food to be given to them should have been in a broken dish. Their dress was formed of the garments discarded by the dead, and their ornaments of black iron, not of copper, silver or gold. Imposition of so called duties upon these unfortunate people caused immense misery to them. They were made incapable of holding any right or status. The customary duties, which resulted into disabilities, were accompanied by severe punishments of cutting the tongue, pouring hot oil, cutting the foot off. The unlawful slaying of an untouchable did not entail any legal or moral responsibility.

Even in later times, these people, according to Hutton (while describing the position of exterior castes, which in South India generally consisted of various classes of 'cultivating serfs' and were till recently tied to the land), were subjected to forced labour, to do agricultural work and work of an unclean nature. Punitive laws imposed heavy punishments in case of refusal to do unclean work or forced labour ('*Veth*' or '*Begar*'). Basu defines *begar* as involuntary work without payment. Under the zamindari system, tenants, particularly of the lower classes, were compelled to do free service to the landlords. Sivaswamy Aiyer mentions that the *Sudras* were reduced to subjugation. He opines that in all probability some of the aboriginal inhabitants became the slaves of the individual owners, and the rest stood in the relationship of unattached labourers or serfs. The L. Elayaperumal Committee describes the position of Scheduled Castes under various kinds of *veth* or *begar* systems as under :

The Scheduled Castes are made slaves of caste Hindus because of their economic dependence and untouchability. If these people refuse to do any menial work given to them by the caste Hindu, they would be subjected to all sorts of persecution, even burning their huts, not engaging them in any work and forcing them into unemployment, even sometimes physical torture, etc. In short, they would be socially boycotted in all respects. As these poor people economically depend on the landlords, their future life in the villages would become impossible. There are instances that in such cases they left their villages.

These constant conflicts in the lives of the untouchables with the higher castes on account of the *ghetto* system existing in every village in India, perpetuates untouchability. Ambedkar mentions

that India is a land of villages and so long as the village system provides an easy method of marking out and identifying the untouchables, the untouchables have no escape from untouchability.

In 1949, when the Constituent Assembly framed the Constitution of India, the founding fathers of the Constitution wanted to abolish these disabilities and every form of untouchability. Article 17 formed the first effort. However, in practice due to the built-in agelong traditional conservatism of the high caste Hindu society, movements against the facilities to be provided to the oppressed classes were started in a subtle form. Attempts to deny rights to these people are still going on. This attitude makes implementation of legislation difficult. The Untouchability (Offences) Act, 1955 (Act 22 of 1955) prescribed punishment for practice of untouchability and for enforcement of any disability arising therefrom.³ The law does not confer upon the untouchable any economic right against the caste Hindus; after an interval of two decades, the passing of the Untouchability (Offences) Act, 1955 was followed by the Protection of Civil Rights Act (Act 106 of 1976) which, it must be stated, is an improvement on the earlier Act.

Despite the passing of statutes (as provided by Article 17 of the Constitution), like Untouchability (Offences) Act, 1955 and the Protection of Civil Rights Act, 1976, the problems of the untouchables have not been substantially solved compared to those of their caste Hindu religionists. The chief weapon in the armoury of the Hindus is the economic power which they possess over the poor untouchables who are socially backward, psychologically and economically weak, and numerically small.

Some of the experts compare the problems of the former untouchables with coloured people in America. However, for our purpose it is essential to compare our civil rights legislations with American legislation. We may examine the various modes adopted in the United States to put an end to the discriminations

3. Section 3 for religious disabilities, Section 4 for social disabilities, Section 5 for refusing to admit persons to hospitals, Section 6 for refusing to sell goods or render services, Section 8 for cancellation of licence in certain cases, Section 10 to 'impose collective fines' and others.

faced by the Negroes known as Blacks in that country. We can also find a parallel in that country in the status of the Negro minority. In 1896, the U.S. Court in *Plessy v. Ferguson* declared the Civil Rights Act of 1875 of U.S.A. as unconstitutional. The Act had been passed to declare certain acts of discrimination found in the States as unconstitutional. However, for the first time in 1957, a Special Civil Rights Commission was established within the Department of Justice in U.S.A. The problem of discrimination against the Negro was being effectively handled in the U.S.A. by the creation of Federal Civil Rights Commission, conferring authority on the Department of Justice to intervene in the name of the United States in cases of discriminatory practices against the Negroes in all phases of their life.

The Civil Rights Act, 1964 in the U. S. created employment opportunities and recognised the right to equal opportunity in employment, in all phases of employment including hiring, promotion, apprenticeship and other training programmes and assignments. Employers, both private, public or government, labour unions and employment agencies are required to employ Black Minority persons. The Civil Rights Act also includes provisions for housing and urban development in respect of the Black Minority.

The Civil Rights Act, 1964 in the U. S. provides safeguards against discrimination under several titles.⁴ Several economic plans for development of the Black Minority have also been introduced, variously known as Philadelphia Plan, Sullivan's Opportunities, Industrialization Centre, Black Labour Organisations. The number of Black labour activists in several major labour unions has increased, and they effectively protect the rights of this minority.

In India, unfortunately, the leadership of the untouchables is effectively suppressed by the trade union leaders from high caste Hindus. They even suppress morchas, movements of the sweepers, scavengers and other workers who belong mainly to the Scheduled Castes.

4. I. Voting, II. Public Accommodation, III. Public Facilities, IV. Public Schools, V. Civil Rights Commission, VI. Federal Aid, VII. Employment, VIII. Statistics, IX. Courts, X. Conciliation and XI. Miscellaneous.

It is because of the initiative taken by different voluntary agencies in the United States, which include the associations of active White social reformers like N.C.C.P.A., that the Negroes could achieve improvement in their life. However, in India, the Hindus are not coming forward to help the cause of these people on those lines because of their caste prejudices. It is distressing to record that even a letter written by Dr. B.R. Ambedkar to the General Secretary, Anti-Untouchability League, New Delhi, on November 14, 1932, requesting him to undertake certain programmes (viz., a campaign to secure civil rights, ensuring equality of opportunity, social intercourse and employment and creating an agency for effecting a change in the social environment of the depressed classes) was not given any serious consideration.

The Indian Civil Rights Act (106 of 1976) in comparison with that of the U.S.A. of 1964 is a feeble one, without any direction or scheme. The Indian Act, if it really is meant to protect the Scheduled Castes, must adopt the scheme of the U.S. Act, with special provisions of economic development, like new settlements, relief from unclean work, etc. How can it be done if the political will in the establishment is lacking?

With regard to political rights and reservation we have in a nutshell to examine the problems as under.

In Articles 330 and 332 of the Constitution of India, provision has been made for reservation of seats for the Scheduled Castes in the House of the People and the State Legislative Assemblies in India. The aim of the founding fathers of the Constitution being to provide equal opportunities to all, is yet not worked out by the majority of the Hindu people. Ambedkar, who endeavoured to frame an enlightened Constitution to stand the test of time for the people of India, was defeated in the elections. When Mr. V.V. Giri was defeated by a Scheduled Tribe candidate in the election to the Lok Sabha, by a judgment in *V.V. Giri v. Suri Dora*⁵, the Supreme Court, through Justice Gajendragadkar, observed that the Hindu caste system came to be based on birth alone. It would be extremely difficult, therefore, to attain the

5. AIR 1969 SC 1327.

status of a higher caste by virtue of one's volition, education, culture or status. In the words of Justice Kapur⁶, 'caste became rigid and hereditary when vocations became hereditary'.

Even a highly educated man of the Scheduled Castes in a village is condemned as 'untouchable'. The famous sweepers' strikes in Ahmedabad in 1944 and in Bombay in 1949 to improve their conditions were ruthlessly suppressed by the ruling class. When their leaders were detained, caste Hindu trade union leaders remained passive spectators, while some of them became strike breakers. These facts would only reveal that the untouchables are even today forced to stay in villages in ghettos which only perpetuates untouchability. They have either to do unclean work or be attached to the soil permanently.

It can be said, without serious contradiction, that the higher castes of the Hindus who form only one-fourth per cent of the entire population share and dominate 80% of posts in the Governments of the Union and the States of India, and 4½% of them share amongst themselves the entire arable land of India. Two per cent of the business class among them are monopolising all channels and posts in industry, trade and commerce. No impartial person will deny the justice of the demand that such monopoly of posts and commerce and in land should be distributed amongst all the persons of the country with a special weightage to socially depressed classes to make up their neglect in the past; also that unclean jobs now being performed by the untouchables should be shared equally by all.

Against this background, provisions for reservation of jobs in appointments to services and posts in connection with affairs of the Union and the States under Article 335 of the Constitution do not in effect give any protection at all to the vast majority of the Scheduled Castes. With the claims made by the high caste Hindus who raise the bogey of the so-called 'maintenance of efficiency of the administration' and such 'efficiency' being decided by the officers consisting of the ruling class caste Hindus, such reservations of jobs do not effectively help the Scheduled Castes in practice and they hardly get any justice. When Dr. Ambedkar

6. AIR 1969 SC 1327.

thought to make India a casteless society by embracing Buddhism and called upon the Scheduled Castes to embrace Buddhism, the so-called protection given by Article 335 of the Constitution by way of facilities for jobs to them was taken away from these converts to Buddhism from the Scheduled Castes. According to Justice Mudholkar speaking for the Supreme Court in *Punjabrao v. Meshram*⁷ the word 'Hindu' must be construed to mean only orthodox Hindu religion which recognised castes and which contained injunction based on caste distinctions. The Bombay High Court did not make it any easier for a Buddhist convert from the Scheduled Castes to claim benefits under Article 335 of the Constitution.

Protective discrimination as aforesaid could never be a permanent establishment of the Scheduled Castes, which was meant to remove their disabilities and confer on them in practice equality of status and opportunity *vis-a-vis* the higher caste Hindus. But this machinery has utterly failed. Dushkin states: 'Protective discrimination as a whole has become a mechanism for social centre, an instrument of distributive politics. This type of politics is a game played by both sides, recipients as well as donors.'

Discrimination in Education

The foundation of education in India is still based on belief in the Vedas which emphasised superiority by birth and the sacraments. The ancient belief that education, property and citizenship rights go nearly with the *Dwijas*, and the *Sudras* and untouchables, like the Negroes in America, were not capable of receiving education still prevails. Based on this theory, women, Scheduled Castes and Scheduled Tribes, known as weaker sections, had no right to education. Moreover, the right of imparting education was vested only in the priestly castes. Thus, till recently the monopoly of education was vested and exercised by only the high caste Hindus in the Hindu society. The Education Commission (1964-65) has only confirmed that caste loyalties are encouraged in a number of private educational institutions: for example, the Banaras Hindu University and the Aligarh Muslim University, organised by the Hindus and Muslims respectively.

7. *Punjabrao v. Meshram*, AIR 1965 SC 1179.

It would not be out of place to reproduce an extract from a paper submitted at a seminar (1978) on 'Problems of Education' of teachers :

When there are more than 100 universities in India, at least one university in each State be established for the Scheduled Castes and Scheduled Tribes and neo-Buddhists. The number of professors, university teachers belonging to the Scheduled Castes and Tribes in the established universities are negligible. Occupational advancement, economic success and social status depend upon vocational and college education. From different education reports, it can be concluded that education in all spheres of life of the untouchable is extremely meagre.

Immediately after the framing of the Constitution of India the Supreme Court in *State of Madras v. Champakam*⁸ gave decision not favouring reservations. In *Jaswant Kwar v. State of Bombay*⁹ it struck down an order requisitioning lands for the construction of a Harijan colony.

Statutory Provisions and the Implications of Social Policy

India's social policy is wedded to securing a 'social order' to promote the welfare of the people, in which justice, social, economic and political is established according to the Preamble of our Constitution. According to the Sixth Five Year Plan, 52 per cent are agricultural labourers and 33 per cent of agricultural labourers are Scheduled Castes. The population of the Scheduled Castes in the country is about 100 million. With regard to the magnitude of the problems of Scheduled Castes, ex-Secretary, Harijan Sewak Sangh states as under :

The magnitude of the problem can be gauged from the fact that the population of the Scheduled Castes was about eight crores in 1971, constituting 14.6% of the total population in the country. There are only 4 countries (U.S.S.R., U.S.A., Indonesia and Japan) which have a total population of more than 9.5 crores, that is, the population of the Scheduled Castes in India today. There is considerable inter-State variation in the population of the Scheduled Castes.

8. *State of Madras v. Champakam*, AIR 1951 SC 226.

9. AIR 1959 Bom 461.

India is predominantly rural; 80% of its population live in villages. But in the case of the Scheduled Castes, the percentage is even higher (88%) due to lack of mobility to urban areas for want of adequate chances of settlement in different occupations and housing accommodation. In States like Assam, Bihar, Himachal Pradesh, Jammu & Kashmir, Orissa, Tripura, Uttar Pradesh and West Bengal, this percentage exceeds 90.

Atrocities

The recent report of the Commission for Scheduled Castes and Scheduled Tribes (1979-81) observes as under :

- (a) It would be seen from the information available that there was an increase in the incidents of atrocities on Scheduled Castes in the States of Bihar (14.22%), Haryana (28.78%), Himachal Pradesh (42.42%), Karnataka (35.10%), Kerala (15.64%), Madhya Pradesh (19.32%), Punjab (106.02%) and Pondicherry (35.71%).
- (b) It would be seen from information that out of a total number of 13,341 atrocity incidents on Scheduled Castes, 482 were murder cases, 1,355 pertained to violence, 530 rape cases and 921 arson cases. There were 10,053 other offences.

Observations and conclusions with possible remedies can be mentioned as under.

Observations and Conclusions :

These few reported cases of atrocities are only illustrative and not exhaustive. The opinions on such kinds of atrocities and harassments are expressed by few personalities like our late Prime Minister Indiraji and Babasaheb Ambedkar.

Different courts have taken important decisions regarding the historically known untouchables as :

1. That the Untouchables are *Sudras*.
2. That the Untouchables are *Panchamas*.

Duties prescribed to Untouchables in Ancient India

- (a) One occupation only the Lord prescribed to the *Sudra* to serve meekly to *Dwijas* (three upper varnas).

(b) *Sudra* whether bought or unbought be compelled to do servile work and though emancipated by his master is not released from the servitude.

(c) *Sudra* can have no property (Manu Smriti).

Laws of Manu may not be in force today but the customary unwritten directives of the ancient orthodox system prevails all over India. This can be proved from the Report of the Commissioner as under :

The earlier reports of the Commissioners contain detailed description about the prevalence of untouchability in various parts of the country. Various studies on untouchability were conducted by this organisation, non-official agencies and social scientists and all these studies indicated that this evil was in existence in almost all the States and Union Territories. The practice was observed in more active form in rural areas of the country where it was being practised in various forms such as denial of common water sources, places of worship, village schools, communal dinners and celebrations of social and religious functions. It may be of interest to indicate that sometimes the evil changes its form but untouchability continues to be practised as before.

The Report cites many instances of migration to other areas to escape harassment such as :

Many cases of social boycott due to elections were reported from Banda district. Commissioner for S.C. and S.T. visited some of the villages of Banda district and found factors such as landlessness amongst S. Cs., incorrect entries in the land records and *harvashi* system, not giving possession of allotted lands, absence of cottage industries, indebtedness, tensions on account of Lok Sabha and Panchayat elections responsible for unrest and exploitation of Scheduled Castes. It was found that some of the Scheduled Caste persons had migrated to other areas to escape harassment.

The main crux of the situation is summarised by Dr. Ambedkar in his memorandum to the Constituent Assembly as under :

At present, the Hindus live in the villages and the untouchables live in the ghettos. It is the system of the village plus ghetto which perpetuates untouchability. Untouchables are a body of landless labourers who are entirely dependent upon such employment as the Hindus may find it profitable

to pay. This economic dependence has also other consequences besides the condition of poverty and degradation which proceeds from it. The Hindu has a code of life, which is part of his religion. This code of life gives him many privileges and heaps upon the untouchable many indignities which are incompatible with the dignity and sanctity of human life.

Like Buddha the compassionate master Dr. Ambedkar proclaims :

The untouchables all over India are fighting against the indignities and injustices which the Hindus in the name of their religion have heaped upon them. A perpetual war is going on every day in every village between the Hindus and the untouchables. It does not see the light of the day. It is a contest between the Hindus who are economically and socially strong and the untouchables who are economically poor and numerically small.

While forwarding the Memorandum to the Constituent Assembly on 15. 3. 1947 Dr. Ambedkar states :

That social, economic and educational condition of the Scheduled Castes is so much worse than that of the citizens and other minorities that in addition to protection they would get as citizens and as minorities, the Scheduled Castes would require special safeguards against the tyranny and discrimination of the majority

Our late Prime Minister, Smt. Indira Gandhi was aware of the atrocities on the Harijans when she proclaimed on 14th January, 1974 :

Economic betterment often sharpens competitiveness and also social tensions. In many parts of India some of the better-off groups have resorted to organised attacks on Harijans. In the old days, the backward classes meekly submitted to such aggression and did not complain. Now they are awake and aware of their rights. Perhaps this is resented by the dominant castes.

She, therefore, wanted perpetual enlargement of social justice which she defined :

Social justice in India means not only removing economic disparity as between class and class but the wiping out of social discrimination and disabilities. Our social revolution is a frontal attack on castes.

The main recommendations/observations drawn by the Scheduled Caste Commission are as under.

In-depth studies conducted by the organisation of the Commissioner for Scheduled Castes into some of the serious crimes committed on Scheduled Castes have revealed that various socio-economic maladies have been causing distress among Scheduled Castes. Foremost amongst these happen to be denial of equal treatment, their normal rights and privileges, lack of adequate protection for their lands and other possessions and exploitative practices by vested interests in the matter of wages, rural indebtedness and also the practice of bonded labour. At times, mere expression of their determination to resist an anticipated injustice invites unprovoked heavyhanded treatment resulting in atrocities of varying magnitudes, with law and order machinery pitifully lacking in effectiveness. Inadequate legal protection therefore only helps to aggravate these problems. It is really unfortunate that the affluent sections committing atrocities are helped in their nefarious activities by lower level revenue and police officials and even by politicians.

Remedies : The agricultural sector contributes nearly one-half of the national income, provides livelihood to about three-fourth of the population. A very small minority of persons (4%) possess huge estates and own about 42% of land in the country. In India one-fifth of the rural population is landless. Prof. Rao states that most of agricultural workers belong to the depressed classes (Harijans) which have been neglected from ages. Therefore Dr. Ambedkar suggested the following provisions :

1. There shall be a settlement commission under the new Constitution to hold uncultivated lands belonging to the State in trust for settlement for the Scheduled Castes in separate villages.
2. The Union Government shall set apart annually a fund of Rs. 5 crores for the purpose of promoting the scheme of settlement.
3. The Commission shall have the power to purchase any land offered for sale and use it for the said purpose.

The Union Government shall from time to time pass such legislation as may be necessary for the Commission to carry out its functions.

As long as untouchables live in ghettos in small minority the atrocities will indefinitely be perpetuated. Therefore they should have equality in all economic fields to raise their dignity.

Secondly: Dr. Irawati Karve suggested: 'In my opinion the best solution to this problem is to help the untouchables (Mahars) in the villages to be transferred to urban industrial centres where they not only become absorbed in the economic development but where it is easier to break down the segregation in which they are subjected in villages.'

Thirdly: In order to implement Article I of the U.N. Charter of the Human Rights the Adi Andhra Convention of India submitted a memorandum to the United Nations for creating international machinery to solve segregation in the world including America, Africa, India, Japan, England etc. by establishing a special agency on the lines of I.L.O. This should be done.

Fourthly: Neo-Buddhists of the State of Maharashtra should be included in 'the list of Scheduled Castes of Maharashtra' under Article 341 of the Constitution of India.

Fifthly: The present laws regarding the removal of untouchability should be reviewed on the lines of the American legislation.

Sixthly: There are above five thousand economic development blocks in the country. Blocks in which population of the Scheduled Castes is above 50% should be established/created and given special help in order to enable the members of this community effective benefits from Five Year Plans.

The late Prime Minister had suggested a number of improvements in special component plans in her letter dated 12th March, 1980 to the Chief Ministers/Governors of the States. The directions of the said letter should be effectively implemented by the State Governments up to village level for the benefit of *Harijans*.

Lastly: All voluntary agencies be federated together to fight against this evil of 'untouchability'.

Dr. Ambedkar while addressing the conference of the former untouchable women at Pandharpur on December 30, 1937 about three problems, expressed himself as under. The first was whether they would be ever given an equal status in Hindu society; the second was whether they would get the proper share of national wealth; and the third was that would be the fate of the self-respect, self-help movement; and he answered: With regard to the first, it was not possible as long as the caste system existed. As to the second, he expressed strong resentment at the treatment they got from the ruling political party which was ruled by the capitalists, who were out to exploit them. They must win their economic independence. Respecting the third he said they have nothing to lose but they had only to shed the fear of death. He suggests abolition of 'caste system', economic independence and constant struggle to attain equality for former untouchables.

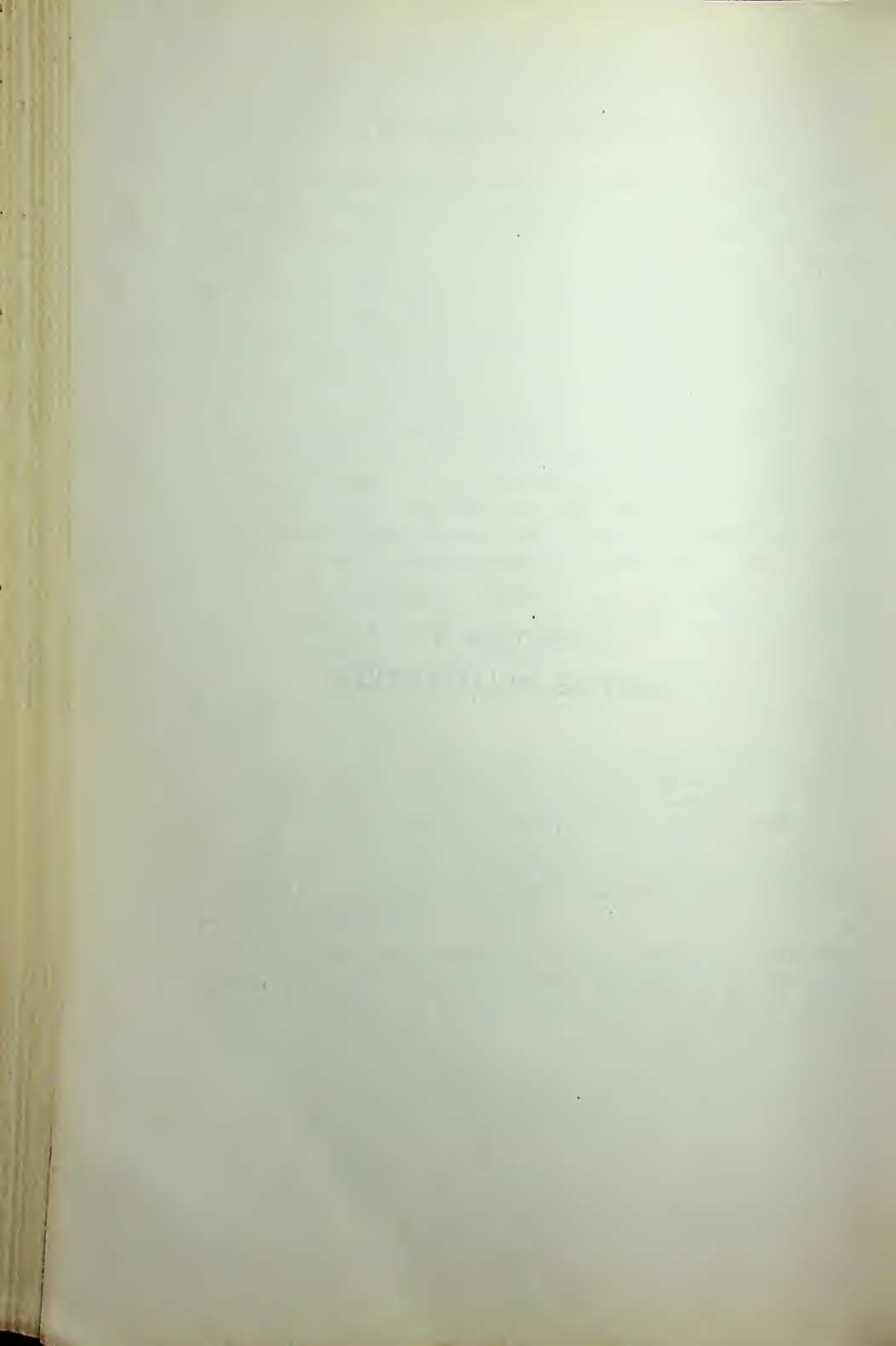
Dr. Ambedkar states: 'There is only one period in Indian history which is a period of freedom, greatness and glory. That is the period of the Maurya Empire.'

About our National Flag our first Prime Minister, Pandit Jawaharlal Nehru said:

I am exceedingly happy that we have associated with this flag of ours not only this emblem but in a sense the name of Ashoka, one of the most magnificent names not only in India's history, but in the history of the whole world. This flag that I have honour to present is not a flag of Empire, a flag of Imperialism, a flag of domination over anybody, but a flag of freedom not only for ourselves, but a symbol of freedom to all people who may see it.

Let us take oath to solve the problems arising out of untouchability and of former untouchables for happiness (*Sukhaya*), welfare (*Hitaya*), and material development (*Atthaya*) of everybody.

SECTION 3
JUSTICE IN LITIGATION



PARA LEGAL WORKERS AND JUSTICE TO THE POOR

N. R. MADHAVA MENON

One of the basic strategies by which the Committee for Implementing Legal Aid Schemes (CILAS) expects legal aid to be accessible and meaningful to the vast masses of illiterate and suffering poor in the country is to mobilize and equip social workers and voluntary organisations in the use of law, courts and administrative processes. The idea is to acquaint the people who are already serving the poor and vulnerable groups such as women, children and tribals with the rights and benefits conferred by law and give them the necessary support in seeking redressal of grievances through the instrumentalities of law and State.

Knowledge is power; more so in a democracy governed by rule of law. In India the rich and influential sections have for too long used the law and legal machinery to serve their exclusive interests despite the fact that the Constitution and the laws have, in recognition of the inequities in society, conferred preferential rights and privileges to the weaker sections. A large body of laws intended to ameliorate the conditions of the poor including women and children remained unimplemented or under-implemented. When the poor got involved in legal proceedings, they hardly received competent legal aid with the result the system became oppressive and unjust often denying justice to them. The problem defied solution because of widespread illiteracy and poverty among the beneficiaries, lack of suitable organizational structures and the conventional attitudes and approaches of lawyers and judges to the problems of poverty and development. CILAS started with the normal method of setting up legal aid committees operating from court premises through appointed lawyers who were paid from the legal aid fund on case to case basis. Funds remained unutilized and the impact of the programme was limited at most places. This was partly because

* Professor of Law, University of Delhi and Member, Committee for Implementing Legal Aid Schemes, Government of India.

the legal aid committees expected the people to go to them which implied litigation, awareness of one's rights and remedies and faith in the adjudicative process of court. In rural India it was obviously too much to expect all these from the common people. Furthermore, for a variety of reasons the lawyers in most of the places did not take keen interest in the State-sponsored legal aid schemes. Perhaps the bureaucratic procedure involved was also a little too much to sustain the interest of even the client who sought legal aid either by himself or at the instance of some intermediary.

It was in this context CILAS looked for new strategies and delivery systems to reach justice to the silent majority of suffering Indians. The activism and initiative of the apex court in the country to let in poor man's grievances through class action or representative litigation by people other than the victims themselves provided an instant strategy to CILAS to advance legal aid to the poor. Simultaneous with the institutionalisation of public interest litigation, CILAS took action to publicise amongst voluntary social action groups and public-spirited individuals the potential now available for the poor in seeking access to justice without much cost and technicality. In the course of selling the new strategy to the social workers, CILAS stumbled upon a large number of grassroot people's organisations quietly working for the betterment of the less fortunate people in the countryside. They were either ignorant or disenchanted with the potential that legal process could offer to serve the people better while improving the operation of the socio-political system itself. They were attracted by what legal aid offered without strings and came to ask more questions on the content and scope of the programme. A series of legal aid camps sponsored by CILAS and organized by State Legal Aid Committees gave the grassroot workers opportunities to understand the philosophy of legal aid and its place in the war against poverty. The result was more legal aid camps, rural entitlement centres, para-legal training courses, specialized legal clinics for women and children, public interest causes and a multifaceted movement towards legal literacy and law reform. The movement of course is still confined to small pockets; yet the beginnings of a legal revolution for social justice are discernible which is supported by a large number of

dedicated social workers who can transform the Indian dream of a socialist, secular democracy a reality in the coming years.

One conclusion which naturally emerges from experiences of the last three years in the implementation of legal aid in the country is that the scheme to be successful has to have the involvement of as many people and organizations as possible outside lawyers and judges. In a developed country with relative affluence and literacy, legal aid can possibly be effective with court-oriented, lawyer-managed schemes funded adequately by the State. In this country such efforts though necessary can only be of limited utility. Here legal aid has to reach out to the masses by providing them with awareness of rights, assertiveness against injustice through social mobilization and assistance to seek redress of grievances through all conceivable legal means including litigation. Litigation in the circumstances necessarily occupies only a small component of a dynamic, pro-active scheme of justice to the poor. It has to assume the dimensions of a popular movement for socio-economic reconstruction. The challenges are indeed formidable. Where are the lawyers who understand and involve themselves in these new tasks? How to meet pervasive illiteracy and centuries old complexes in the beneficiaries of the programmes? What about the traditional bureaucracy which evade or distort issues and the small politicians who attempt to use everything in terms of capturing a few more votes for their next election?

CILAS has its own limitations and cannot expect to accomplish everything in a short time which may include ambitious programmes of social justice attempted without success in the past. Yet there is no alternative to the rule of law method. Justice shall prevail. People have to be educated and involved to help themselves for democracy to function and socialism to prevail. Therefore those concerned with peoples' welfare or the country's socialist progress will have to be identified, activated and equipped with the knowledge of the law and the techniques of legal redress. If law is allowed to remain something mystical, technical and accessible only to the rich and educated, this peoples' mobilization for justice under law is not possible. Legal literacy and legal mobilization on a massive scale is the first step for a dynamic scheme of legal aid relevant to the conditions of India today.

Para-legal workers, the obvious answer

In any scheme of legal literacy and legal mobilization of the masses there is need for a cadre of dedicated workers well informed of the mission and its dynamics. Merely generating expectations is not the purpose. It is more to prevent injustice and victimisation that we need legal literacy. Legal mobilization is intended to make people seek recourse to the legal process which is possible only when they themselves are right or duty-conscious. In other words, it is not an angry mob that legal aid of this type generates but orderly law-abiding people who will not tolerate injustice and will be ready to seek legal redress whatever be the sacrifices to be given for upholding the rule of law. This is a delicate task which has to be planned in every detail to have the optimum return. Can para-legal workers fill the bill?

The term para-legal in western countries is synonymous with legal assistants who are trained in certain legal skills which support the work of a lawyer. Short of giving legal advice and argue in court on behalf of clients, these legal assistants who are sometimes licensed under State laws are authorised to perform a variety of legal functions such as interviewing clients, drafting of documents, legal research, law office administration and litigative assistance. In the context of legal aid these are not the para-legal whom we are looking for. Para-legal in the Indian context has to be an agent, directly or indirectly involved in legal aid activities, particularly those which conventional lawyers refuse to perform such as legal literacy, legal mobilization, public interest advocacy and law reform. They have to undertake in some situations the help that 'touts' around the courts now offer to poor litigants, of course, for a price. Para-legals have to be equipped for achieving fair negotiated settlements outside the courts and firm administrative decisions from government departments as ordained by welfare laws. He is to be a helpful intermediary between the lawyer and the poor litigant.

As the para-legal of the above description is not just available readymade, we need to select and train them to the tasks awaiting them. Who are the persons who can receive such training? What sort of training should be given? How to give them the necessary

legal, organisational and financial support so that their functioning can be supervised, monitored and integrated with the conventional scheme of court-oriented legal aid schemes? These are some of the issues which engage the attention of CILAS today. In the process of finding solutions to these and other problems, CILAS felt it necessary to have a continuing dialogue with all non-political voluntary organizations in the country whether they are concerned with legal aid or not. Mr. Justice P. N. Bhagwati, Chairman, CILAS in one of his articles wrote :

If we want to bring about change in the social and economic structures that are responsible for poverty and ignorance, it is absolutely essential to operate through social action groups. The traditional legal service programme which consists of providing legal assistance to the poor seeking judicial redress for the legal injury caused to them is not at all adequate to meet the specific needs and the peculiar problems of the poor in our country. The success of the traditional legal service programme would depend upon at least two factors: (1) the person affected should be able to realise that the problem he faces is a legal problem and that a lawyer can help him, and (2) he must know where he can get such legal help. These two preconditions are markedly absent in our country, and their absence would render any traditional legal service programme ineffective and deprive it of meaning and utility Moreover, the traditional legal service programme would be highly expensive and burdensome and it would almost certainly suffer not only on account of paucity of lawyers but also on account of their indifference and lack of enthusiastic cooperation.

Bringing out the unsuitability of traditional legal aid in our country Justice Bhagwati stated that in a society where legal equality is just formal and not real (because of pervasive economic and social inequality) legal service of the conventional type is largely irrelevant.

The traditional legal aid is actor and not structure oriented. It assumes that the law is just and that injustice results from violation of the law. It fails to realise that violation of human rights of the poor is caused mostly by unjust social and economic structure. The traditional legal service programme cannot, therefore, attack the problem of poverty and bring about developmental change. It looks upon the poor as simply traditional clients without money; it

is confined to problems of corrective justice and is blind to the problems of distributive justice.

Legal service programme designed to change the conditions of poverty and to use the law for distributive justice will therefore necessarily have to seek peoples' involvement from outside the legal profession particularly of social workers, law students and social action groups. This new concept of legal aid does not regard litigation as playing an important role in the life of the poor and hence refuses to consider the court as the centre of all legal activities. It is concerned more with the problems of the poor as a class rather than with the individual problems of the poor which may continue to get adjudicated in court. It strives to get institutional changes including changes in the law so that the causes of inequality and injustice are, as far as possible, removed or controlled. It strives to educate the poor and organize them to participate in the process of change so that whatever institutional changes take place may become real and meaningful to them.

This perspective of legal aid provides some guidelines about the type of persons who can be involved in legal aid to the poor (outside the legal profession), the nature of para-legal functions they can hopefully perform in reaching justice to the poor, the scope of training required to be given for equipping them to the tasks and the organisational structures which may coordinate the dispensation of legal services under the new package. A two-day seminar organized by CILAS in 1982 attended by over fifty social action groups from all over the country reacted favourably to the new concept of legal services and offered several concrete programmes appropriate to their working environment. This was followed up by a series of legal aid camps involving those agencies which gave them a firsthand experience of different types of legal services in which they could be involved outside the litigation strategy. CILAS, in turn, discovered what later came to be known as the Rural Entitlement Centres under which social activists turned themselves into para-legals and helped villagers, tribals and rural labourers in getting minimum wages, their quota of essential commodities through fair price shops, education and educational aid through government schools, water supply, electri-

city and other amenities under minimum needs programme, etc. The social workers associated with these centres carried out socio-legal surveys on the state of implementation of welfare laws and brought out hard facts which in some cases acted as a catalyst to effective developmental administration and, in some other cases, to public interest litigation for enforcement of fundamental rights of a large number of rural poor.

As the non-litigative dimension of legal aid assumed popularity and some credibility both among social activists and with the beneficiaries of legal services, there was a demand for supportive programmes including legal training for the workers to carry the message to larger segments of the rural community. It was felt that the workers need not have only information on the laws affecting the poor but some basic skills for lay advocacy by which behaviour could be influenced according to desired goals. There was need to represent a worker before the employer or the district administrator; the women's need for medical services was to be fulfilled from the indifferent government doctor; the police had to be compelled for proper investigation of the crime committed against an illiterate tribal. For all these and many more the social worker had to be equipped with the laws which confer the rights as well as the skills of advocacy to process them effectively through bureaucratic procedures. Furthermore, they need to know the techniques of investigation and gathering of facts which can support legal action. They also need to understand basic materials of legal research, namely, the large body of statutes, rules, regulations, agreements and judicial decisions. They have to appreciate and train themselves to become critical consumers of socio-economic data produced by official and non-official agencies. They may have to cultivate skills of drafting, interviewing, counselling and conciliating. As they get involved more and more in para-legal services they need increasingly most of the skills of the lawyer excepting perhaps representing in litigation and giving advice on legal issues in dispute. The scope of para-legal training therefore depends on the tasks one expects to undertake and strategies appropriate to the need of the situation in hand.

CILAS itself organized a para-legal training course for

women social workers in Delhi with the specific objective of identifying women's problems and evolving suitable system of delivery of justice to women. About 50 women workers representing 22 women's organizations attended the three-day course and learnt the elements of the legal system and the laws affecting women, particularly in marriage and family relations. As they found the knowledge they gained useful in their work, some of their organizations themselves took the initiative in convening study groups and full-fledged para-legal courses with the assistance of CILAS. One such course of 2 months' duration was organized by the *Mahila Dakshita Samithi*. The Women's University in Bombay with financial support from CILAS further developed the contents of the programme and introduced a regular para-legal course which attracted great response from the women in the city.

In the tribal areas of Orissa, Madhya Pradesh, U.P. and Bihar several para-legal training courses were organized at the instance of CILAS in which tribal youths were exposed to the beneficial laws affecting their community and given the knowhow for seeking redressal of the grievances of the tribal people. In West Bengal an organization called Socio-Legal Research and Training Centre was formed which has institutionalized para-legal courses as a part of its activities. Of course, the impact of this style of legal aid will not be immediately known because it is preventive in nature. Statistics cannot be produced as to how many victimisations have been avoided or how much injustice prevented. Nevertheless the social harmony evolved, the peoples' participation generated and the well-being of the community initiated can be appreciated in different degrees by the discerning observer. There is not a particular model for this type of legal aid but there are clear goals and specific tasks in the agenda which the non-legal (para-legal) personnel can perform with distinction to make the Indian dream of equality and justice nearer to reality.

LEGAL AID IN CRIMINAL PROCEEDINGS

KIRPAL SINGH CHHABRA

Life and personal liberty are precious things for every individual and every effort is necessary to protect them till one is convicted by a court according to the procedure established by law. It is for this reason that right against deprivation of life or personal liberty except according to the procedure established by law has been guaranteed under Article 21 of the Constitution of India. Also for this very reason, the Indian law presumes an accused to be innocent and puts it on the prosecution to prove his guilt beyond reasonable doubt before he can be convicted and punished.

If prosecution alone were to lead evidence without the right of cross-examination by the accused or only the prosecution were to give arguments without any arguments in defence being put forward, no person even though accused wrongly would escape conviction and punishment. No prosecutor will place before the court evidence damaging to his case, or point out pitfalls in the evidence or argument placed by him before the court. The court is a human being likely to be swayed to conclusion against the accused by these persistent onesided arguments, specially when it has a heavy load of work on hands.

For this reason, the Constitution of India in its Article 22(1) directs that when a person is arrested for any offence, he shall not be denied the right to consult and be defended by a legal practitioner of his choice. A large majority of Indians are very poor and illiterate, living even below subsistence level. In spite of all keenness to protect their life and personal liberty, they, when incriminated in a criminal case, feel themselves helpless in the matter of engaging a lawyer for their defence for want of funds. On account of illiteracy, they cannot plead for themselves before the court. The result is that quite a substantial number of them has to rot in jails for a long time as undertrials. The question

* Dean, Law Faculty, Guru Nanak Dev University, Amritsar.

whether such persons can claim from the State a right to free legal aid has been in debate before the court from time to time. The U. S. Supreme Court has recognised the right of undefended accused to have a lawyer at the cost of the State. In *Gideon's* case¹ Black., J. observed :

Not only these precedents but also reason and reflection require us to recognize that in our adversary system of criminal justice, any person hauled into court, who is too poor to hire a lawyer, cannot be assured of fair trial unless counsel is provided for him.

He further said :

This seems to us to be an obvious truth. Governments, both state and federal, quite properly spend vast sums of money to establish machinery to try defendants accused of crime. Lawyers to prosecute are everywhere deemed essential to protect the public interest in an orderly society. Similarly, there are few defendants charged with crime, few indeed, who fail to hire the best lawyers they can get to prepare and present their defences. That the government hires lawyers to defend are the strongest indications of the widespread belief that lawyers in criminal courts are necessities, not luxuries. The right of one charged with crime to counsel may not be deemed fundamental and essential to fair trials in some countries, but it is in ours. From the very beginning, our State and national constitutions and laws have laid great emphasis on procedural and substantive safeguards designed to assure fair trial before impartial tribunals in which every defendant stands equal before the law. This noble ideal cannot be realised if the poor man charged with crime has to face his accusers without a lawyer to assist him.²

The Law Commission of India in its 14th Report recommended that free legal assistance should be provided to undefended accused without sufficient means tried before the court of sessions. In its 48th Report, the Law Commission suggested making provision of free legal assistance by the State for all accused who are undefended by a lawyer, for want of means. However, only the former recommendation has been adopted in the Criminal Procedure Code, 1973. Section 304 of the Code provides that where, in a trial before the court of sessions, the accused is not represent-

1. *Clearence Earl Gideon v. Wainwright*, 372 US 335 (1963).

2. *Id.*, p. 344.

ed by a pleader, and where it appears to the court that the accused has no sufficient means to engage a lawyer, the court shall assign a lawyer for his defence at the expense of the State.

The State has not yet issued any notification under Section 304(3), Cr. P. C. for assigning free lawyer in non-sessions cases against the poor unrepresented accused.

According to Article 22(1), no detained person is to be denied to consult, and to be defended by, a legal practitioner of his choice. In terms, it does not require the State to give to the indigent accused free lawyer of his choice; his right to free legal aid has been recognised by the Supreme Court as part of fair procedure under Article 21 of the Constitution.³ As observed by Bhagwati, J. in *Sheela Barse v. State of Maharashtra*, "...legal assistance to the poor or indigent accused—is a constitutional imperative mandated not only by Article 39-A but also by Articles 14 and 21 of the Constitution".⁴ Though right to free legal assistance for the indigent accused stands accepted, its being made actually available in all deserving cases and then as per choice of the accused needs to be considered on the anvil of practicability. The Supreme Court⁵ has declined to accept the position of State being compelled to allow lawyer to the accused as per the latter's choice. At the same time we need keep in mind that any imposition of a counsel without consulting the accused may nevertheless be suspected specially when State is one of the parties in criminal cases. Any such engagement of a lawyer when read as imposition, direct or indirect, would be self-destructive and would cut at the root of the philosophy of legal aid. On the other hand the State cannot cater to the extravagant claims of an accused for a very expensive lawyer of his discriminating taste. Since the district authorities are maintaining a panel of lawyers, wherefrom one is drawn for a particular case, the indigent accused may be allowed to have anyone from the same. This may meet the objection to a large extent.

3. *M.H. Hoskot v. State of Maharashtra*, (1978) 1 SCC 248; *Hussainara Khatoon v. State of Bihar*, (1980) 1 SCC 98, 105.

4. (1983) 2 SCC 96.

5. *Ranjan Dwivedi v. Union of India*, (1983) 3 SCC 207.

Scales of remuneration for empanelled lawyers are modest. For example, an empanelled lawyer in Punjab gets Rs. 16, Rs. 32 and Rs. 100 per day for appearance before the sessions court, the High Court and the Supreme Court respectively. These are quite unattractive specially in the present day age of high prices. These call for upward revision. Such revision cannot, however, be substantial in view of financial limitations. Accordingly, senior lawyers do not and will not generally get themselves empanelled, and the accused in consequence will get only junior lawyers. This qualitative difference can put him at a disadvantage unless the lawyer puts in very hard labour and at the same time the court, by its own questions on prosecution witnesses and by correcting the lawyer when found going astray, helps him so that just decision becomes possible in the case. This indulgence from the court would in no way be objectionable if kept within proper limits and would rather be called for by way of its duty to do justice in the matter. This finds judicial approval in various cases like *Sessions Judge v. Intha Ramana Reddy*⁶; *Kunammal Mohammad v. State of Kerala*⁷; *Sheikh Abdul Aziz v. State of Mysore*⁸. This will also make the lawyer more vigilant in handling such cases, to his definite advantage of getting established in the profession in the times to come.

Non-session cases of indigent accused for which no obligatory provision for free legal aid has been made in Section 304 of the Code of Criminal Procedure are, as already submitted, quite large in number. If such persons are really to avail of right of protection before the law as contemplated in Article 14, and if they are really to be assured of their personal liberty, requisite arrangement for their proper defence is necessary. State funds can no doubt be allocated for their defence in view of addition of entry 11-A (Administration of Justice) in the concurrent list and Article 39-A in the Chapter of Directive Principles of State Policy. This article lays before the State the ideal of providing free legal aid to citizens suffering from economic or other disabilities. The State may not, however, be able to spare sufficient funds to meet

6. IAWR 340.

7. AIR 1963 Ker 54.

8. (1974) 2 Ker LT 378.

the need in all such cases for some time more in view of demands of developmental activities. One of the solutions may be to be selective and refuse this assistance to such types of offenders who do not deserve free aid in view of their past conduct or in view of the nature of their present offence. The other way out, and also the most important way out, is organisation of this aid from voluntary sources.

Habitual offenders, smugglers, economic offenders under the Arms Act or those violating social legislations like anti-dowry law, untouchability laws, may be excluded from the purview of free legal aid schemes as the offenders are either those who would be committing, in accordance with their habit, further depravation on society after being relieved from the charge, or are those who are stigma on the face of the society and deserve to suffer on their own. After these exclusions defence can be arranged for the remaining categories of indigent accused by pooling human and monetary resources of the State and public. There is the necessity that skill at law whether of lawyers, law teachers, law students is utilized to the maximum on gratuitous basis and structure for free legal aid may be raised at local, district, State and national levels. The lawyers may be made conscious of nobility of their profession and in consequence, of their responsibility towards indigent members of the society.

The Advocates Act may be amended to enable the law teachers, who are otherwise well up in law, to handle cases of indigent entrusted to them by the above proposed body. Services of the final year students of law can be availed of to do the work of hunting the law and drafting of applications/appeals, under supervision, for cases of the indigent and in the process, get more depth in their study of law with the help of live cases. This will also help them in getting social reorientation and realism of life, so necessary to equip them well for the profession. As an incentive this work may be considered as part of their practical training prescribed for award of law degree.

As practice of law is a means of livelihood, free service cannot be expected from the profession beyond a reasonable limit. If the problem of free legal aid to the poor is to be solved when the State by itself cannot own the entire financial responsibility, funds have

to be collected from different sources for supplementing the State grants. These should be placed at the disposal of free legal aid authority constituted at the State level under the supervision and guidance of this authority. Free legal aid societies should function at local, district and the High Court levels and the senior-most judicial officer, executive officer, prosecuting officer, dignitary of bar associations, social worker and head of law department, if available at a particular level, should be its members. The concerned local body needs a clerk and one lawyer on retainer basis with location of office, preferably in the courts. This suggestion is based on the necessity that whenever a client comes, he should be able to find someone to look into his problem. It is necessary to do so in order to provide him with, so badly needed, feeling of seriousness about the mission of the legal aid society, and also for the purposes of ensuring that he does not fall victim to unhealthy practices of touts during his waiting hours. Experience with existing legal aid clinics has not been happy to the desired extent on account of absence of this facility at the moment. Funds are needed for this nuclear staff, other incidental expenses of office, process charges, and fee of lawyers empanelled for the purpose. Besides grant from the State, these have to come from contributions of individuals, corporations and other voluntary organisations. As an incentive such contributions should be exempt from income tax in the hands of the society and such societies should be got registered under Income Tax Act as charitable institutions. Since the Legal Aid Societies are to handle criminal as also civil and other cases, assistees succeeding in this litigation can also be asked to make voluntary contributions to augment society funds. Suitable provision should be made in law for passing on costs awarded to successful assistees to the legal aid society concerned.

A peculiarity in criminal cases of the poor is that since they are unable to engage lawyer for grant of bail, they remain in jails as undertrials. A majority amongst them are without families, are uneducated and are arrested as vagrants. Others, specially in border districts, are those arrested for offences under the Official Secrets Act and their families are unaware about their internment. They are, therefore, unable to approach legal aid agencies directly or indirectly. Accordingly there arises an

unusual problem of locating them and then providing them necessary legal aid. Accordingly it becomes necessary to have some liaison of the legal aid society with the prison authorities so that the latter furnish necessary information and facility of interview with the accused to the representative of the society.

As to eligibility of a person for getting aid from the society, the question may not pose very serious difficulty in criminal cases of the type proposed to be covered by the scheme; personal liberty is the most precious thing for every individual so that he normally does get himself represented by an advocate if by any means he can manage it. Unrepresented accused will generally be those who have not sufficient means. Subject to this general consideration the society may apply means test of allowing assistance to all with income up to Rs. 500 per month. In view of legal presumption of innocence of accused, merit and purpose tests, so essential in other cases may not in general be invoked in these cases.

EQUAL JUSTICE IN PREVENTIVE DETENTION JURISPRUDENCE SOME PROJECTION FOR LEGISLATIVE REFORM

I. P. MASSEY

The concept of equal justice to the weaker sections covers those low visibility areas of humanity where people due to social, economic, political or physical disadvantage cannot reach the spring of justice. If the law is to usher in an era of Rule of Law society, it must be made responsible and responsive to the needs of these less fortunate sections of our society. A person in detention belongs to such a low visibility area due to tremendous constraints which he suffers in detention when arrayed against a formidable opponent, the State. Against this backdrop an attempt has been made in this paper to focus attention on persons detained under preventive detention laws of the country.

Preventive detention is the deadliest of all legal weapons that has the capability of destroying all liberty and freedom at one stroke. Article 22 of the Indian Constitution legitimizes preventive detention. It is capable of grossest misuse by any government to stay in power by silencing all opposition to it. Mahavir Tyagi, a member of the Constituent Assembly, had reminded Dr. Ambedkar, Chairman of the Drafting Committee, of this possible misuse. He said :

I have suffered from such detention. How I wish Dr. Ambedkar was with me in jail after being arrested and handcuffed for a whole night? I wish he had my experience. If he had been handcuffed along with me, he would have experienced the misery. I fear, Sir, the provision now proposed by him would recoil on himself. Sir, as soon as another political party comes to power, he along with his colleagues will become the victims of the provisions now being made by him.¹

* Professor & Head, Deptt. of Laws and Dean, Faculty of Laws, H.P. University, Simla.

1. C.A.D., Vol. 9, p. 1548.

The use of preventive detention on extensive scale backed by the exclusion of judicial review during the last emergency created serious doubts relating to the legitimacy of Article 22 and the use of preventive detention during peacetime. This doubt is further strengthened in belief after reading the observations of Mukerjia, J. in *A.K. Gopalan v. State of Madras*² that preventive detention was repugnant to democratic constitutions and its inclusion in the Indian Constitution was unfortunate, especially when no other democratic constitution was found to provide for preventive detention.

It is curious to note that countries like United States and Britain were able to deal effectively with all emergencies of peacetime without using anything like preventive detention and even during the emergency of war, preventive detention was used against sabotage, subversion and violence circumscribed by the power of judicial review by the courts. The United States Constitution does not provide for preventive detention. Therefore, the source of power of preventive detention in America has been a subject of controversy. However, Chief Justice Stone found its roots in the war powers which are shared by the Congress and Executive under the scheme of the Constitution.³ Lincoln was the first President who used the power of preventive detention during the Civil War without any Congressional authorization. However, in March 1863 Congress enacted a law which not only legitimized the preventive detentions but also provided for further exercise of power by the President.⁴ Even during the grim emergency of Civil War, Congress provided certain unique safeguards for the detenus. A list of state detenus had to be furnished to the circuit and district courts, and if grand juries found no

2. AIR 1950 SC 27.

3. *Hirabayashi v. United States*, 320 US 81, 93. "Since the Constitution commits to the Executive and to the Congress the exercise of war powers in all vicissitudes and conditions of warfare, it has necessarily given them wide scope for the exercise of judgment and discretion in determining the nature and extent of the threatened injury or danger and in selection of the means in resisting it....The choice of means, therefore, includes preventive detention to fight an emergency."

4. Swisher: *American Constitutional Development*, 1943, p. 284. Legislation became necessary in view of the possible suits against the officials involved.

indictments against them, they were to be discharged by judicial order. However, even in the face of this unique protection, court held that the trial by Military Commission violated the Third Amendment of the Constitution, which vests judicial power in courts, and also violates the jury trial guarantees in the Fifth and Sixth Amendments and search and seizure clause of the Fourth Amendment.⁵

It is a unique fact that the measure of preventive detention was not resorted to during the World War I. However, when Japanese bombs case loaded upon Pearl Harbour on December 7, 1941, plunging the United States into a global struggle for existence of World War II, preventive detention was used in the form of relocation of the Japanese residents of the West Coast.

The constitutionality of curfew and relocation measures was sanctioned by the court only as an emergency war measure and that too with remarkable exception:

The most drastic restraint of personal liberty imposed during World War II was the detention and relocation of the Japanese residents of the Western States, including those who were native-born citizens, of the United States. When various phases of the programme were challenged, the court held that in order to prevent espionage and sabotage, the freedom of movement of such persons could be restricted by a curfew order, even by a regulation excluding them from a defined area, *but that a citizen of Japanese ancestry whose loyalty was conceded could not be detained against his will in a relocation camp.*⁶

The Japanese-American cases though shrouded in a great confusion of rhetoric represent only a constitutional yielding to the awe inspired by the total war very near to every home, but even then total eclipse of freedom was not sanctioned.

After World War II was over there was growing national hysteria about communist activity of espionage and sabotage. Therefore, in order to meet the needs of internal security, Congress passed Emergency Detention Act, 1950⁷ which comes

5. *Ex parte Milligan*, 4 Wall 2 (1866).

6. *Constitution of the United States* (Cong. Ed.), 1964, p. 345. See *Hirabayashi v. United States*, 320 US 81; *Tasui v. United States*, 320 US 115; *Korematsu v. United States*, 323 US 214; *Ex parte Endo*, 323 US 283.

7. 64 Stat 987 (1950).

into operation only when the President declares internal security emergency. However, unique safeguards built into the Act by the Congress may be noted to appreciate the concern for liberty even when national security is at stake. The warrant for arrest is to be signed by the Attorney-General or any other officer specially authorised in this behalf and such warrant must be supported by oath and affirmation.⁸ The person to be detained shall be supplied with the copy of the warrant. Attorney-General shall also designate the place of confinement.⁹ Within forty-eight hours after arrest, the person is to be presented before the Preliminary Hearing Officer who shall inform him about the ground of detention, his right to counsel, right to preliminary examination, and right to silence.¹⁰ If he requests a hearing he must be allowed reasonable time to consult lawyer, to introduce evidence in his defence and to cross-examine witnesses. The government has no special privilege except the general power to withhold documents in the interest of national security. This privilege is not conclusive and is subject to judicial review. If the Hearing Officer confirms the order of detention, he shall furnish a copy of the same to the detenu and shall inform him about his right to petition before the Detention Review Board. Detainee has been given the right to send additional information to the Attorney-General regarding his detention. On the basis of such information Attorney-General has the power to order his release. This authority of the Attorney-General overrides any initial or final order of detention of the Hearing Officer, Board or Court.¹¹ Detention Review Board is appointed by the President consisting of nine members with the advice of the Senate. The members may be removed by the President only on the ground of neglect of duty and malfeasance. The Board has power even to make an order of indemnification if detention is unwarranted and the Attorney-General shall make the payment.¹² Section III(a) of the Act contains provisions of judicial review of the decision of the Board.

8. See 104 (a) ISA, 150 Title II.

9. *Ibid*, (c).

10. *Ibid*, (d).

11. Section 104 (c), ISA.

12. Section 109 (a), ISA.

Attorney-General has not been given such a right. The court has power to review even the findings of fact by the administrative authority and may quash the decision if the decision is not supported by substantial evidences.¹³ In all cases of detention, the law prescribes a fairly objective standard of detention to check the reckless executive behaviour. The Executive, Hearing Officer and Board all have to satisfy themselves as to whether the person sought to be detained has knowledge concerning sabotage or espionage activities including transmission of strategic information to a foreign government or a foreign political party or the communist party of the United States or any other political party whose aim is to overthrow the United States Government by violent means, and the substitution in its place of a dictatorial form of government.¹⁴ The authority has also to reach a conclusion objectively whether such a person has been in any way actively associated with any such activity in the past, or whether such a person has taken part in the espionage or sabotage operations of the communist party of the United States, or has been a member of the party or any other organization with a similar objective or purpose.¹⁵ It may be noted that detention under the Act is not a penal measure; therefore, the detenu does not suffer the stigma of a prison sentence. It is curious that even in the face of these various safeguards, President Truman's Commission on Civil Rights characterized the Act as the most striking interference since slavery with the right of physical freedom.¹⁶ From the above analysis it becomes clear that preventive detention in the United States is essentially a wartime measure and even when it is applied in case of internal security emergency, it is confined to sabotage and subversive activities. Even in such situation the law prescribes a highly objective standard for arrest and safeguards of wide magnitude. The example of America is instructive, for not only the constitution has a Bill of Rights, but the "due process" clause of the Fourteenth Amendment also which greatly increases judicial control over the

13. Section III (d), ISA.

14. Section 109 (1), ISA.

15. Section 109 (2), ISA.

16. Sutherland: "Freedom and Internal Security," 64 HLR 383.

legislature and the Executive. And yet it did not become necessary to suspend fundamental rights.

The struggle of the British people against violations of personal liberty by the King culminated in the Petition of Rights, 1628 which provided that the orders of the sovereign were not sufficient justification for the imprisonment of his subjects.¹⁷ The *Habeas Corpus Act*, 1679 added new dimensions to personal liberty. The Act guaranteed the right to the writ of *habeas corpus* to all persons imprisoned for criminal or supposed criminal matters except in case of conviction by a court of law. The Act provided heavy penalty for not making a due return and also a fine of £500 for wrongfully refusing the writ.¹⁸ The writ can, however, be suspended in case of a national emergency caused by war, riot or rebellion, but only if the Parliament passes an Act to this effect.¹⁹ Nevertheless, it is a fact to be noted that the writ was not formally suspended even during the period of two World Wars which threatened the survival of the country, though due to the exigency of situation the power of preventive detention had been given to the Executive.²⁰ Regulation 14-B which provided for preventive detention during the period of World War I authorized only the Secretary of State to sign the detention order. Every person detained, unless he was a subject of a State at war with England, had the right to make a representation to the Advisory Committee presided over by a High Court judge. The doors of the court were opened ajar amidst the clash of arms. The constitutionality of Regulation 14-B was upheld in *Rex v. Halliday, ex parte Zading*²¹ primarily on the ground that preventive detention is justified at a time of great

-
17. This nullified the result of *Darnell's Case* in which it was held that the King has absolute power to commit and from committal there is no appeal, (1627) 3 St Tr I, Kair and Lawson, *op. cit*; p. 37.
 18. This Act followed the case of Jenks (1676) who was detained for several months after his speech urging the summoning of Parliament. See Holdsworth: *History of English Law*, Vol. IX, pp. 112-117 and Fraser: *Outlines of Constitutional Law*, 2nd ed., Chapter 17.
 19. Keith: *Constitutional Law*, p. 437.
 20. See Regulation 14-B, Defence of the Realm Consolidation Act, 1914 and Regulation 18-B, Emergency Powers (Defence) Act, 1939.
 21. 1917 AC 260.

public danger.²² World War II broke out in 1939 and once again it became necessary to eliminate the danger of espionage and sabotage by secret agents. Therefore the power of preventive detention was once again given to the Executive by the Parliament by passing the Emergency Powers (Defence) Act, 1939. Again no attempt was made to prohibit access to the courts. Regulation 18-B covered only persons of hostile origin or association or persons engaged in acts prejudicial to the public safety or defence of the realm. Detention order had to be signed by no less a person than Secretary of State. The detenu also had the benefit of review by the Advisory Committee appointed by the Secretary of State. Though the advice of the Committee was not binding on the Secretary of State but the advice was rarely ignored.²³ Another safeguard against the possible misuse of the power of detention was that the Secretary of State was required to make a report to the Parliament at least once in every month about the number of persons detained and other questions which might be relevant thereto, including the cases in which the advice of the Advisory Committee was not accepted.²⁴ It is pertinent to note that out of 1769 detention orders made by the end of 1941 under Regulation 18-B, 1655 related to persons who were of German or Italian origin or were adherents of the British Union of Fascists.²⁵ However, even for them the protection of courts was available. In *King v. Home Secretary ex parte Budd*,²⁶ the court ordered the release of the person who though a member of a fascist organization but was wrongly informed that his arrest was on the ground of his being of hostile origin. Therefore, the courts even in face of a mortal crisis, did not permit governmental action which went beyond the necessities imposed by war.

With this comparative material at our command, we may discuss the law as contained in Article 22 of the Indian Constitution which provides for preventive detention. It is gratifying to

22. *Ibid.*, p. 270.

23. In over a hundred cases, representing about five per cent of the total number of cases heard by the Advisory Committee, the Home Secretary did not accept the recommendation of release. Allen, *op. cit.*; pp. 240-41. See also 55 *Harv L Rev* 1014-15.

24. Regulation 18-B, Clause 3 (6).

25. Heuston: "*Liversidge v. Anderson in Retrospect*," 86 LQR 42.

26. (1942) 2 KB 14.

note that welcome changes have already been made in Article 22 by the Constitution (Forty-fourth Amendment) Act, 1978.²⁷ The Amendment Act has reduced the period of detention from three months to two months beyond which a person cannot be detained unless an Advisory Board recommends his detention. The Amendment Act has further changed the constitution of Advisory Board to make it more independent of the government. The Advisory Board shall now be constituted in accordance with the recommendations of the Chief Justice of the appropriate High Court, and shall consist of not less than two members and the Chairman. The Chairman shall be a serving judge of the appropriate High Court and other members shall be serving or retired judges of any High Court.²⁸ Even after these amendments, the total mischief of preventive detention has not been remedied. Therefore, further possible changes in Article 29 may now be considered.

1. The power of preventive detention must be confined to the situations of war, an external aggression or imminent threat of war or external aggression. Preventive detention cannot be legitimized during the time of peace on the ground of internal strife of any type. Government can effectively deal with its people within the State according to ordinary laws. The appeal of national security for imposing preventive detention is now universally condemned. Parameters of national security during peacetime which may include even sabotage, subversion and violence are not peculiar to India. The United Kingdom and the Irish Republic are confronted with the problems posed by the Irish Revolutionary Army, — a campaign of putting bombs, and of late, incendiary bombs, on a large scale. Preventive detention, which was adopted for a short time in Northern Ireland, provoked such resentment that it had to be given up; and the methods used to obtain information from the detainees were also given up after public criticism, and were later

27. These changes, unfortunately, have not been made operational because the government has not issued a notification and the Supreme Court expressed its inability to issue a writ of mandamus.

28. Constitution (Forty-fourth Amendment) Act, 1978, Section 3.

condemned by the European Court of Human Rights.²⁹ In the month of May, 1981, after the death of four prisoners belonging to the Irish Revolutionary Army in the Maze prison who refused to accept food unless the status of political prisoner is accorded to all such prisoners, a fresh wave of violence was unleashed in Ireland, but even at this stage imposition of any preventive detention measure seemed to be a remote possibility.³⁰ Therefore, if the strategy of preventive detention is to play its desired role it should be confined to war situations only, otherwise the possibility of its becoming a normal technique for the governance of the country cannot be totally ignored.

2. After the amendment of Article 22 by the Amendment Act of 1978 the period within which a person can be detained without reference to Advisory Board has been reduced from three months to two months. Even this reduced period seems to be unreasonable. The argument of administrative convenience ought not to prevail against the grave infraction of liberty where a detenu is denied the rights available to a person charged with the commission of a crime. It is against all canons of propriety of civilized societies that a person should pay through his liberty for the inertia of the government. If there is sufficient material before the detaining authority which has been thoroughly studied in an objective manner before making a detention order there seems no reason why the authority should still take two months before giving him the benefit of Advisory Board. It may be recalled that even during the grim crisis of World War II, Justice Murphy was unprepared to accept that the inconvenience and administrative difficulty of holding individual loyalty hearings for the 112,000 persons involved could justify the governmental action. Therefore, the period of 'two months' in clause (4) would then read: 'No law providing for preventive detention shall authorize the detention of a person for a period longer than forty-eight hours unless the Advisory Board . . . has reported that there is

29. See Seervai, H.M., *op. cit.*, p. 89.

30. See Indian Express, May 23, 1981, p. 6.

sufficient cause for such detention." This will also keep the administration on the tap.

3. Constitution (Forty-fourth Amendment) Act, 1978 has certainly improved the constitution of the Advisory Board by making only High Court judges, serving or retired, eligible for appointment. This would improve the quality of the functioning of the Board. However, as regards retired judges, it is wrong in principle that the hope of any office should be held out to them when they are on the bench. The power to appoint judges on their retirement to such Advisory Boards would undermine the independence of the Judiciary.³¹

4. Once it is realised that preventive detention is an evil, no matter a necessary evil, it cannot be overemphasised that the detenu needs better procedural safeguards than those now available before the Advisory Board. It may be noted that the genesis of the term 'advisory board' lies in the British rule in India where in the face of rising nationalism, the government constituted advisory boards to advise the government on political detentions in relation to their repercussions on the totality of political situation in India. Under the scheme of the Indian Constitution the purpose of Advisory Board is in fact 'adjudicatory' rather than 'advisory'. However, its anti-legal procedure is still being maintained. Its proceedings are held in camera and only a portion of its report comes before the public.³² The protection which is available even to an ordinary criminal is not available to a detenu. Therefore, Article 22 be suitably amended to make the function of the Advisory Board quasi-judicial. Advisory Board should develop the record of the proceedings which must be made available to the detenu immediately after the decision of the Board. The record should consist of notice, grounds of detention, evidences, oral and documentary, legal arguments and the decision. This will enable the detenu to

31. See Scervai, H.M., *op. cit.*, p. 91. To use Justice Hidayatullah's phrase, this would make judges not 'forward looking' but 'looking forward'.

32. Section 11 (4) of the Maintenance of Internal Security Act, 1974.

exercise his right to judicial review expeditiously and effectively. Detenu must also be allowed the assistance of a lawyer, right to cross-examination and the right against self-incrimination.³³ These are the basic norms of criminal jurisprudence of every civilized society allowed even to ordinary criminals, hence should not be denied to a detenu. This is also necessary to promote constitutionalism and rule of law in the functioning of the government.

5. Article 22 even after its amendment by the Constitution (Forty-fourth Amendment) Act, 1978 in clause (6) empowered the detaining authority not to disclose facts if in its opinion such disclosure is against the public interest. This power is dangerous if the government is allowed to suppress all classes of relatively innocuous facts. It is true that law must protect genuine secrets of State, but if State is permitted to withhold facts which are either against its case of detention or in favour of the interest of the detenu, it would violate the principle of rule of law. It is not surprising that the State having been given a blank cheque, may be tempted to overdraw.³⁴ The highest bench through a series of decisions³⁵ has brought back into legal custody this dangerous executive power, but in the interest of the justice to the detenu it is necessary that this power must be exercised by the Advisory Board. The Board must be competent to hold a preliminary enquiry in order to determine the validity of the objection. If during the course of investigation against the detenu, government finds certain documents or information, some of which are against the interest of detenu and some are in favour of him, the Board should have power to compel the production of documents and information which favours the detenu, because suppression of such information would be a gross violation of the principles

33. In *A.K. Roy v. Union of India*, (1982) 1 SCC 271, the Supreme Court denied to the detenu the right to cross-examination, public hearing and summon facility. Thus it missed an opportunity of developing a viable detention jurisprudence.

34. *U.S. v. Reynolds*, 345 US 1 (1953).

35. *State of Punjab v. Sodhi Sukhdeo Singh*, AIR 1961 SC 493; *Amar Chand v. Union of India*, AIR 1964 SC 1958; and *State of U.P. v. Raj Narain*, (1975) 4 SCC 428.

of natural justice. Besides all this, the members of the Advisory Boards "must be more than quietly impartial; they must be positively disposed to defend the rights of detenus. For the members of the Advisory Boards are more than just judges, they are called upon to play the role of defence counsel for the otherwise bereft detenus."³⁶

6. Article 22 may also be suitably amended to provide that only the Home Minister of the Centre or the State concerned shall be competent to sign the warrant of arrest. Under the provisions of the Preventive Detention Act, 1950 (now repealed) and the National Security Act, 1980, the power of detention may be exercised by a government officer even of the rank of collector and police commissioner. The warrant must be accompanied by an affidavit signed by such person to the effect that he is personally satisfied that such order is necessary for the reasons set out therein. It is absolutely necessary if the casual manner in which the power of detention is exercised is to be avoided. Instances are not lacking where the orders of detention have been signed in blank.

The Home Minister must also be under obligation to make a report to the Parliament at least once in every month about the number of arrests made during the month and the number of persons released after the decision of the Advisory Boards finding no cause against them. It may be borne in mind that at the height of moral crisis of the Second World War such an obligation had been imposed on the Home Secretary in England. This would enable the Parliament to supervise the use of preventive detention. It may be recalled that it was this discussion in Parliament which led to the amendment of Regulation 18-B during the period of World War II in England.

7. Article 22 provides only procedural safeguards to the detenu which in themselves are not something insignificant in any manner. However, it cannot be said to be a complete

36. Prof. David Bayley, quoted in A.G. Noorani's "Preventive Detention Revived", *Indian Express*, September 17, 1980.

code for the protection of a detenu unless it also provides for substantive parameters with reference to which legislative and executive power may be exercised. In the absence of such substantive parameters the legislative and executive powers may run over the dykes of personal liberty nullifying even the procedural protection. It is only because of the fact that Article 22 does not provide for substantive parameters, that it has been legally possible in India to use preventive detention against membership of political parties, expressions inciting communal tension, organized expression of demands, criminal acts of assault, eve-teasing, theft, possession of stolen property, vagrancy, recidivism, disfiguring national monuments, exciting disloyalty, disturbance among jail inhabitants and criticism of the judiciary.³⁷ Therefore, substantive parameters must be brought to play at the constitutional level so as to constrict the amplitude of legislative power and to enable the courts to develop substantive restraints on the exercise of the power of detention so as to limit its use to situations where the operation of the politicolegal process is actually jeopardized or seriously threatened.³⁸ Hence Article 22 must provide to restrict preventive detention to the cases of espionage, sabotage and subversion during an emergency of war or external aggression. If the United States and Britain have tackled the crisis of two world wars with these parameters so why not India? For this purpose a clause may be added in Article 22. No matter these constitutional parameters would be in general terms but these would give a guidance to the legislature, executive and the judiciary as to the purposes for which preventive detention can be used. This would also help the detenu in clearly identifying the legitimacy of his detention for seeking redress.

8. It seems paradoxical that whatever safeguards Article 22 provides against the extraordinary measure of preventive detention could be negatived during the period of emergency when such safeguards are needed the most. By a proclamation of the President issued under Article 359 enforcement

37. See, generally, Rekhi, V.S.: "Preventive Detention: Need for Substantive Restraints", *Indian Constitution Trends And Issues*, 1978 ILI 216.

38. See *ibid.*, p. 231.

of any article in Part III of the Constitution may be suspended during the period of emergency. It may be noted that the enforcement of Article 22 has been suspended four times since India became independent. The last suspension came on June 27, 1975 when the President imposed a blanket ban on the enforcement of fundamental rights. This measure received legitimation from the highest bench in the *Habeas Corpus* case.³⁹ It is true that with the amendment of Article 359 by the Constitution (Forty-fourth Amendment) Act, 1978 it would now no more be possible for the President to suspend the enforcement of Articles 20 and 21, hence no executive action of detention would receive that legitimation from the court again. Nevertheless, to make the law clear beyond all doubt it is necessary to provide in Article 22 itself that the power of judicial review of preventive detention orders shall not be excluded during the period of emergency.

9. In view of the above conclusions it would be necessary to amend Entry 9, List I and Entry 3, List III of the Seventh Schedule. Entry 9, List I empowers Parliament to make law relating to preventive detention for reasons connected with defence, foreign affairs, or the security of India. In the same manner Entry 3, List III empowers Parliament and State legislatures both to make law relating to preventive detention for reasons connected with the security of a State, maintenance of public order or the maintenance of supplies and services essential to the community. Since it is proposed that the declaration of emergency should be confined to the cases of war or external aggression, Entry 3 in List III should be deleted because within the scheme of the Constitution there is preponderance of influence in the Centre in matters of war and external aggression.⁴⁰ Entry 9, List I should also be suitably amended to restrict the power of the Parliament to make law relating to preventive detention for reasons connected with espionage, sabotage and subversion.

10. The purpose behind preventive detention is 'prevention' and not 'punishment'. Therefore, no interference

39. *A.D.M., Jabalpur v. Shivakant Shukla*, (1975) 1 SCC 716.

40. See Entries 1, 2, 3, 4, 5, 6 and 7 of List I of the Seventh Schedule.

with liberty under preventive detention must be penal in character. However, in India the persons preventively detained are kept with the ordinary criminals in jails under ordinary jail discipline.⁴¹ This is an antithesis of preventive jurisprudence. In U. S. A. it is the Attorney General who prescribes the place where the persons could be detained, and the Congress sanctions funds for the maintenance of such places.⁴² In England the Secretary of State had a legal duty under Regulation 14-B passed by the Executive in exercise of its power under Realm Consolidation Act, 1914 to prescribe from time to time that the detenu shall reside in such place as may be specified in the order. The same provision was repeated in Regulation 18-B passed during the crisis of World War II. Detention in these countries does not carry any stigma of a criminal punishment. It is, therefore, suggested that the law of preventive detention must provide that it shall be the duty of the authority signing the warrant of arrest to specify the place where the detenu is to be detained in non-penal custody. Parliament must sanction funds for the maintenance of such camps. With their experience of non-penal custody in preventive detention cases in England, Rowlatt Committee also recommended :

If in the supra interests of the community the liberty of individuals is taken away an asylum must be provided of a different order from a jail.⁴³

Detention laws generally empower the State to regulate the place and condition of detention. It is only by an executive order made under this provision that the detenu is lodged in an ordinary jail. But imprisonment is one of the forms of 'punishments' prescribed by Section 53 of the Indian Penal Code. Punishment without trial is patently violative of Article 21 of the Constitution. The Constitution permits 'preventive detention' but surely not imprisonment without trial. Therefore, it would be perfectly

41. Though now the Supreme Court has held that there must be separate confinement for persons under preventive detention, yet in practice not much appears to have changed. See *A.K. Roy v. Union of India*, (1982) 1 SCC 271.

42. Emergency Detention Act, 1950, 64 Stat 987.

43. A.G. Noorani, write-up in Indian Express, November 10, 1979, '*Prisons and Political Prisoners*'.

open to the courts to strike down as invalid executive orders which prescribe jails as places for lodging detenus.

Detention without trial is an anathema to all those who love personal liberty because such detention makes deep inroad into the basic human freedoms which the people in every civilized society cherish as a higher value of life. The only justification for preventive detention is the supra interests of national security. Sardar Patel while introducing the Preventive Detention Bill in the Parliament on February 25, 1950 expressly mentioned: "When law is flouted and offences are committed, ordinarily there is the criminal law which is put into force. But where the very basis of law is sought to be undermined and attempts are made to create a state of affairs in which, to borrow the words of Motilal Nehru, 'men would not be men and law would not be law', we feel justified in invoking emergent and extraordinary laws".⁴⁴ Indiscriminate use of this extraordinary power not only leaves the 'little man' absolutely defenceless and vulnerable in view of the 'pale shadow of safeguards' but enfeebles investigative machinery and benumbs sensitivity to citizen's rights. Therefore the transmission of duty to create viable substantive and procedural parameters in order to operationalize liberty and power from legislature to the courts cannot be overemphasised.

An alternative to preventive detention

The most pernicious cost of preventive detention in any society is the erosion of respect for the system of justice and a growing sense of injustice and persecution. It undermines the legitimacy of public institutions and gravely downgrades the respect for liberty. All this happens because preventive detention seeks to imprison a person for unproved crimes. It violates the presumption of innocence. It transgresses the basic principle of natural justice in that it denies cross-examination of the accusers. There is no procedural due process in the detention hearing either before the government or the Advisory Board. It shortcircuits the right of access to counsel. No record is prepared and no speaking order is made. A person may suffer detention even on the basis of

44. A.G. Noorani: "*Preventive Detention Revived*," Indian Express, September 17, 1980.

evidence which may not be evidence at all in the legal sense of the term. Judicial review itself is no safeguard at all. Per force the power is reduced to interference only in cases where the orders are made in technical breach of legal provisions. The manner in which Advisory Boards function does not create any confidence in the mind of the detenu. The proceedings are nearly *ex parte*. The government can withhold material in public interest even from the Advisory Boards. These faults in the working of the detention laws in India may be multiplied without making the list exhaustive.

But what is the alternative? A process of reform in the general detention laws which has already been discussed in the preceding pages of this paper is certainly not the alternative. Today neither of the States in India have preventive detention laws covering public disturbances. There is law providing for preventive detention of smugglers and foreign manipulators and there is the recent law for hoarders, blackmarketeers, etc. All that the government seeks to achieve through the general preventive detention law can also be accomplished by an amendment of the Criminal Procedure Code on the following lines :

1. The Central Government and the State Governments and other specified officers may be empowered to direct the arrest of anyone reasonably suspected of acting in any manner prejudicial to the security of the State or to the maintenance of public order or maintenance of supplies and services essential to the community.

2. The person so arrested shall be dealt with under Chapter V of the Code of Criminal Procedure, 1973. In particular, he shall without unnecessary delay be produced before a magistrate having jurisdiction in the area where the arrest is effected.

3. The magistrate shall then scrutinise the information upon which the arrest has been directed and unless he is of the opinion that the arresting authority had acted perversely he shall make against the person produced one or the other of the following orders, namely :

- (i) He shall remain in a specified area.

- (ii) He shall report his presence and whereabouts to a designated authority.
- (iii) He shall desist from specified conduct.
- (iv) He shall submit to specified forms of surveillance.
- (v) He shall deliver up weapons and other property likely to be used in the commission of an offence to a designated authority.
- (vi) For all or any of the aforesaid purposes, he shall furnish such security as in the opinion of the magistrate would effectively prevent him from acting in the manner suspected. On the failure to furnish such a security he may be detained in a specified place subject to such restrictions which may be necessary for the purpose of detention.⁴⁵

45. See also Ram Jethmalani : "*An Alternative To Preventive Detention*", Indian Express, October 14, 1980.

PRISON JUSTICE : THE JUDICIAL ETHOS AND HUMAN RIGHTS OF THE PRISONERS

SUDESH KUMAR SHARMA

The jurisprudence of prison justice in India is based upon constitutional law and is being developed through case law.¹ The human rights contained in Parts III and IV of the Constitution bear vital significance on the notions of crime and criminality and the nature of the sentence which an accused has to serve in a prison setting. The constitutional edicts² like, 'We the people of India', 'Justice—Social, Economic and Political', 'Dignity of the Individual', 'Equal Protection of Laws', 'Six Freedoms', 'Fair Procedure before deprivation of Life and Liberty', 'Free Legal Aid', etc. humanize the prison justice system emphasising the restoration and rehabilitation of offenders through correctional technology. However, in practice, these constitutional mandates are rarely paid homages, thus leaving the consumer of our prison justice often forlorn and disgusted. The reasons for this are not

* LL.M., Dip. Int. Law & Diplomacy (Delhi), Ph. D. (Panjab), Lecturer in Law, University of Jammu.

1. The cases decided by the Supreme Court in the recent past (since early 1977) on the subject of prison justice contain lengthy and detailed references to the human rights of the prisoners. Some of these deserving special mention are:

Hiralal Mallick v. State of Bihar, (1977) 4 SCC 44; *Mohammad Giasuddin v. State of A.P.*, (1977) 3 SCC 287; *Sunil Batra v. Delhi Admn.*, (1978) 4 SCC 494, (hereinafter referred as *Sunil Batra I*). *Charles Sobhraj v. Delhi Admn.*, (1978) 4 SCC 104; *Madhav Hoskot v. State of Maharashtra*, (1978) 3 SCC 544; *G. Narasimhulu v. Public Prosecutor, A.P.*, (1978) 1 SCC 240; *L. Vijay Kumar v. Public Prosecutor*, (1978) 4 SCC 196; *Maneka Gandhi v. Union of India*, (1978) 1 SCC 248; *Hussainara Khatoon v. State of Bihar*, 1-V, (1980) 1 SCC 93; *Mantoo Majumdar v. State of Bihar*, (1980) 2 SCC 406; *Prem Shanker v. Delhi Admn.*, (1980) 3 SCC 526; *Sunil Batra v. Delhi Admn.*, (1980) 3 SCC 488, (hereinafter referred as *Sunil Batra II*). *Kishore Singh v. State of Rajasthan*, (1981) 1 SCC 503; *Francis Coralie v. Union Territory of Delhi*, (1981) 1 SCC 608; *Rakesh v. B.L. Vig, Supdt., Central Jail, New Delhi*, 1980 Supp SCC 183; *Kadra Pehadiya v. State of Bihar*, (1981) 3 SCC 671; *Prabha Dutt v. Union of India*, (1982) 1 SCC 1; *Harbans Singh v. State of U.P.*, (1982) 2 SCC 101; *Sheela-Barse v. State of Maharashtra*, (1983) 2 SCC 96.

2. See Preamble, Arts. 14, 19, 21 and 39-A of the Indian Constitution.

far to seek and are well explained by Krishna Iyer, J., in the following words :

This Rights Revolution and Values Transformation militantly implicit in our Constitution have, however, been innocently ignored for long by courts and academics so much so the imperial flag still flies over the intellectual empire of the Indian criminological thought and criminal law in courts.³

The administration of prison justice has the conflicting problems of: (i) jurisdictional dilemma between 'hands off prisons' and 'take over jail administration'; (ii) the constitutional conflict between detentional security and liberties of the inmates and (iii) the role of processual and substantive reasonableness in stopping the brutal jail conditions.⁴ These problems have in turn given rise to several interesting questions whose solution it is submitted would be of great use in ensuring prison justice. These questions are whether our prison system has a conscience in constitutional terms? Whether a prisoner *ipso facto* forfeits his personhood and becomes a rightless slave of the State? Whether a prison-setting *ipso facto* outlaws the rule of law, locks out the judicial process from jail gates and declares a long holiday for the human rights of the prisoners? Whether the man-management of prison society can operate its arts by zoological strategies ignoring the human dignity of the inmates altogether? This paper aims at analysing the prison justice in these very perspectives with the emphasis that in our constitutional scheme the prisoners possess enforceable liberties and in case of their infringement the prison power has to bow before the constitutional power. The philosophy of rehabilitation as an ideal of prison justice is stressed and sorted out. An analysis of the decisions of the apex court is undertaken to show that our judiciary is conscious of the rights of the prisoners and has always tried to safeguard them as a *sentinel on qui vive*. The mandates regarding personal liberty of the prisoners, the nature of punishment which a prisoner has to undergo in a prison setting and the matters of general administration

3. V. R. Krishna Iyer: "Sentencing Alternatives, Correctional Administration, Juvenile Justice and Community Participation in Crime Control", 1980 Cri LJ 1 (Journal).

4. See *Sunil Batra v. Delhi Admn.*, (1978) 4 SCC 494.

of prisons: the prisoners' right to bail, to legal aid and to speedy trial; the right to have a copy of judgment and the facilities of appeal to be provided to the prisoner by the jail administration are enumerated and explained *serialim* with the help of judicial dictas contained in various judgments.⁵

Ideals of Prison Justice

Our criminal jurisprudence dates back to the days of Lord Macaulay, who in his famous Minutes of 1835 observed that: "Imprisonment is the punishment to which we must chiefly trust." He was of the view that "such regulations as shall make imprisonment a terror to wrongdoer and shall at the same time prevent it from being attended by any circumstances shocking to humanity" should be established. Prisons, besides, having the custodial functions served as a penal agency whose main objective was to destroy the criminal streak amongst the convicted offenders. The retributive-cum-deterrent philosophy was the underlying policy of the penal administration during those days. The main idea of prison administration was safe custody and security and minimization of chances of violence, escape and suicide. This notion was gradually replaced by the philosophy that prisons are houses of correction and reformation, where a prisoner should get an adequate opportunity to reform himself and must also be enabled to readjust himself within the society on his release.

The prison-system must aim at changing the habits of inmates through training and inculcation of ethical values and this can be obtained by creating healthy attitude towards their families, rights of others and towards law through canalisation of impulses. The Standard Minimum Rules for the Treatment of Prisoners approved by the First United Nations Congress on the Treatment of Offenders at Geneva in 1955 provide that the basis of training must be to accord to the prisoners "the respect due to

5. See Paras Diwan: "*Torture and the Right to Human Dignity*", (1981) 4 SCC 31-37 (Journal). See also R. K. Raizada "*Prisoner's Human Rights: Custodian's Unconscionable Ethos and Jurisconscience*" in P. Diwan (ed): *DIRECTIVE PRINCIPLES OF JURISPRUDENCE*, pp. 47-65 (1982).

6. See *Sunil Batra I*, (1978) 4 SCC 494: 1979 SCC (Cri) 155: 1978 Cri LJ 174.

7. *Ibid.*

8. *Supra* Note 3 at 7; see also *SENTENCING AND PROBATION*, National College of State Judiciary, Reno Nevada at 65.

their dignity as human beings'' and to inculcate in them the will to lead a good and useful life on their discharge into the society.

Article 18(3) of the International Covenant on Civil and Political Rights adopted by the General Assembly on December 16, 1966 provides :

'The penitentiary system shall comprise treatment of prisoners the essential aim of which shall be their reformation and social rehabilitation. Juvenile offenders shall be segregated from adults and be accorded treatment appropriate to their age and legal status.

The British White Paper entitled "People in Prison" gives a profound thought about prison justice which is equally good for India as for the United Kingdom. It reads :

A society that believes in the worth of individual beings can have the quality of its belief judged, at least in part, by the quality of its prison and probate and of the resources made available to them.

Sir Winston Churchill was of the view :

The mood and temper of the public with regard to the treatment of crime and criminals is one of the most unfailing tests of the civilization of any country.

In the words of George Bernard Shaw :

If you are to punish a man retributively, you must injure him. If you are to reform him, you must improve him and men are not improved by injuries.

According to Sir Geoffrey Streatfield :

If you are going to have anything to do with the criminal courts you should see yourself the conditions under which prisoners serve their sentences.

It is submitted that we must endorse and adopt these opinions as a part of our constitutional thought, if we want to humanize our prison system. In this context, Justice V. R. Krishna Iyer has noted :

Maintenance of the 'rule of law' in our society necessitates reconsideration of all (modern correctional devices, proceedings and) institutions with a view to such reformulation

of the pertinent rules as to make our law consistent with the spirit of our Constitution.

The Model Prison Manual has come out with a declaration of Guiding Principles of Correctional Administration by stating: "The supreme aim of punishment shall be the protection of society through the rehabilitation of the offenders."

Recognising the fact that the idea of punishment inherent in incarceration cannot be dismissed, the Model Prison Manual reads: "The purpose and justification of a sentence of imprisonment is to protect society against crime. The punishment inherent in imprisonment primarily consists in deprivation of liberty involving confinement and consequent segregation from the normal society. In carrying out that punishment, the Prison Administration should aim at returning of an offender to society not only willing but also able to lead a well-adjusted and self-supporting life."

Dr. Siddiqui is of the view that a well-rounded correctional programme in a prison depends upon the "scientific classification and programme planning on the basis of complete case-history, adequate medical services including psychiatric services; psychological and sociological services needed for education, work assignment, discipline and preparation for premature release, individual and group therapy and counselling; vocational training which is meaningful for outside jobs; education and literacy programme; directed recreation for promoting good morale, sound mental and physical health; discipline that aims not merely conformity with prison rules but inculcates self-restraint; adequate building and equipments for diversified programmes, and, of course, adequate competent, carefully selected trained staff both custodial and correctional, capable to promote high degree of morality and efficiency".⁹

Do these postulates find favour in our prison system? The answer is mostly found in the negative. A study conducted by the Central Forensic Science Laboratory shows that prisons in India have become a breeding ground for crime. The factors

9. Dr. M. Zakaria Siddiqui: "*The Prison as a Correctional Agency*", XI Social Defence 24, 25 (1976).

responsible for this are : the horrible condition in Indian jails run on the outdated British pattern and the influence of hardened criminals on fresh inmates and the absence of segregation between criminals and undertrials and also among different types of criminals. The study narrates that the criminal justice system in the country is most "unscientific and outdated" and is responsible for turning out more criminals because it fails to provide compensation to victims of crime and law.¹⁰

Our prisons in the words of Krishna Iyer, J. are :

(S) till laboratories of torture, warehouses in which human commodities are sadistically kept and where spectrum of inmates range from draftwood juveniles to heroic dissenters.¹¹

In a state of affairs like this where the prison system works simply as an agency to re-enact and re-enforce the very stresses and strains, evils, plights and punishments which lead to the offender's initial deviant behaviour, the rehabilitative programmes fail and when the offender is released, he takes to crime and we presume that the deficiency is in the duration of treatment and not in the very nature of the process administering treatment, so we increase his dosage of treatment incarceration next time. Incarceration in prison, it is submitted, is a totally senseless ritual. It causes grave injustice to the offenders because it is the society who is responsible for the stressful conditions of crime and when they, the weak, succumb, it weakens them further by strengthening their criminal propensities through these conditions. Incarceration is equally unfair to the society by giving it a false sense of security. We come to rely on the illusion that prison is curing our criminals, in fact, it is only hiding, intensifying and then unleashing them in a bigger way. In the words of Lanphear :

We must re-evaluate our concept of rehabilitation and consider it in its purest sense as simply a return to normalcy. The condition of normalcy is achieved by ridding the human nervous system of stress and the abnormalities which it causes.

10. See Indian Express, Chandigarh, April 20, 1981.

11. *Sunil Batra, I*, (1978) 4 SCC 494.

By viewing rehabilitation as a process of normalization a new perspective is gained on each of these problems.¹²

Thus if we want to humanize our prisons, we have to view and rationalise them with the philosophy of rehabilitative justice, the constitutional ethos and the socio-cultural pragmatism. It is submitted that our courts are fully aware of the human rights of the prisoners and have always tried to establish and enforce the rule of law within prison settings through judicial process. Today, our human rights jurisprudence has reached a stage where it can be proudly said that the Indian Constitution recognizes it and the courts are ever ready to protect and enforce it against the onslaughts and inhuman practices of prison administration. The judicial mandates protecting the human rights of the prisoners evolved by the summit court through a series of its decisions pronounced in the recent past are enunciated in the following discussion.

Judicial Mandates in matters of personal liberty, the Nature of Imprisonment in Prisons and the General Administration of the Prisons

(1) A prisoner should not be subjected to deprivations not necessitated by the fact of incarceration and the sentence of the court. He should have the freedom to read and write, to exercise and recreation, to meditation and chant, to creature comforts like protection from extreme cold and heat, to freedom from indignities like compulsory nudity, forced sodomy and other unbearable vulgarity, to movement within the prison campus subject to requirements of discipline and security, to minimal joys of self-expression, to acquire skill and techniques and all other fundamental rights tailored to the limitations of imprisonment.¹³

(2) A prisoner insulated from the world becomes bestial and if his family ties are snapped for long, becomes dehumanised. Vital links between the prisoner and his family should be provided by paroling him out periodically, for reasonable spells, subject to

12. Roger Glenn Lanphear: *FREEDOM FROM CRIME*, pp. 174-75, quoted by Krishna Iyer, J., op. cit. fn. 3, p. 18.

13. *Sunil Batra, II*, (1980) 3 SCC 488, 509.

sufficient safeguards ensuring his proper behaviour outside and prompt return inside.¹⁴

(3) A prisoner is entitled to have interviews with the members of his family and friends and no prison regulation or procedure regulating the right to have interviews can be constitutionally valid under Articles 14 and 21 unless it is reasonable, fair and just.¹⁵

(4) Jailors are bound by the rule of law and should not inflict supplementary sentences. Additional torture by forced cellular solitude or iron immobilisation is unconstitutional.¹⁶

(5) A death sentencee has human rights which are non-negotiable and, even a dangerous prisoner, standing trial, has basic liberties which should not be bartered away.¹⁷

(6) A prisoner 'under sentence of death' is not to be put in solitary confinement. But it is legal to separate such sentencees from the rest of the prison community during hours when prisoners are generally locked in.¹⁸

(7) Prisoners under sentence of death should not be denied any of the community amenities, including games, newspapers, books, moving around and meeting prisoners and visitors. This should, however, be subject to reasonable regulation of prison management.¹⁹

(8) If the prisoner desires loneliness for reflection and remorse, for prayers and making peace with his maker or opportunities for meeting family and friends, such facilities should be liberally granted.²⁰

(9) Undertrials should be deemed to be in custody but not undergoing *punitive* imprisonment, they should be accorded more relaxed conditions than convicts.²¹

14. *Hiralal Mallick v. State of Bihar*, (1977) 4 SCC 44.

15. *Francis Coralie*, (1981) 1 SCC 608, 620.

16. *Sunil Batra I*, (1978) 4 SCC 494, 511.

17. *Ibid.*

18. *Id.*, p. 562.

19. *Ibid.*

20. *Ibid.*

21. *Ibid.*

(10) Use of fetters, especially bar fetters, should be shunned as violative of human dignity. The indiscriminate resort to handcuffs when accused persons are taken to and from court and the expedient of forcing irons on prison inmates are illegal and should be stopped forthwith.²²

(11) Where an undertrial has a credible tendency for violence and escape, a humanely graduated degree of 'iron' restraint should be permissible provided the other disciplinary alternatives are unworkable. The burden of proof of the ground should be on the custodian. And if he fails, he should be held liable in law.²³

(12) The 'iron' regimen should in no case go beyond the intervals, conditions and maxima laid down for punitive 'irons'. They should be for short spells, light and never applied if sores exist.²⁴

(13) The discretion to impose 'irons' should be subject to quasi-judicial oversight, even if purportedly imposed for reasons of security.²⁵

(14) The grounds for 'fetters' should be given to the victim. And when the decision to fether is made, the reasons should be recorded in the journal and in the history ticket of the prisoner in the State language. If he is a stranger to that language, it should be communicated to him as far as possible in his language.²⁶

(15) No 'fetters' should continue beyond daytime as nocturnal fetters on locked-in detenues are ordinarily uncalled for if viewed from considerations of safety.²⁷

(16) The prolonged continuance of 'irons' as a punitive or preventive step should be subject to previous approval by an external examiner like a Chief Judicial Magistrate or Sessions Judge who should briefly hear the victim and record reasons.²⁸

22. *Id.*, p. 562.

23. *Ibid.*

24. *Ibid.*

25. *Ibid.*

26. *Id.*, p. 563.

27. *Ibid.*

28. *Ibid.*

(17) If special restrictions of a punitive or harsh character have to be imposed for convincing security reasons, the jail administration should be made to comply with natural justice.²⁹

(18) A prisoner should be kept in fetters only in extreme cases of compelling necessity for security of other prisoners or against escape. Human dignity is a dear value of Constitution not to be bartered away for mere apprehensions entertained by jail officials.³⁰

(19) Crossbar fetters or solitary confinement should not be imposed on flimsy grounds like 'loitering in the prison', behaving 'insolently' and in an 'uncivilized manner', 'tearing off his history ticket', etc.³¹

(20) Lawyers nominated by the District Magistrate, Sessions Judge, High Court and the Supreme Court should be given facilities for interviews, visits and confidential communication with prisoners, subject to discipline and security considerations. This has roots in the visitatorial and supervisory judicial role. The lawyers so designated should be bound to make periodical visits and record and report to the concerned court results which have relevance to legal grievances.³²

(21) Grievance Deposit Boxes should be maintained by or under the orders of the District Magistrate and the Sessions Judge and should be opened as frequently as is deemed fit and suitable action be taken on complaints made. Access to such boxes should be afforded to all prisoners.³³

(22) No solitary or punitive cell, no hard labour or dietary change as painful additive, no other punishment or denial of privileges and amenities, no transfer to other prisons with penal consequences, should be imposed without judicial appraisal of the Sessions Judge and where such intimation on account of

29. *Kishore Singh v. State of Rajasthan*, (1981) 1 SCC 503, 507.

30. *Ibid.*

31. *Id.*, p. 20.

32. *Sunil Batra II*, (1980) 3 SCC 488, 521. See also *Raksh v. B.L. Vig*, 1980 Supp SCC 183, 187.

33. *Ibid.*

emergency is difficult, such information should be given within two days of action.³⁴

(23) The State should take early steps to prepare in Hindi a Prisoner's Handbook and circulate copies of it to bring legal awareness home to the inmates; periodical jail bulletins stating how improvements and rehabilitative programmes can be brought into the prison should also be carried on. It will create a fellowship and ease tensions amongst the prisoners. A prisoner's wall paper ventilating their grievances should also be introduced.³⁵

(23a) Large notice boards displaying the rights and responsibilities of prisoners should be hung up in prominent places within the prison in the language of the people.^{35a}

(23b) The status based elitist classification of prisoners in jail should be done away with, instead a scientific classification based on the nature of the crime committed, behaviour, character, propensities, age, sex, education and response to jail treatment should be introduced.^{35b}

(24) Punishments of rigorous imprisonment obliges the inmates to do hard labour, but not harsh labour. The hard labour should receive a humane meaning. The prisoner cannot demand soft jobs, but may reasonably be assigned congenial jobs.³⁶

(25) The young inmates should be separated and freed from exploitation by adults. It is inhuman and unreasonable to throw young boys to the sex starved adult prisoners or to run menial jobs for the affluent and tough prisoners.³⁷

(26) Work in prison should be designed constructively and curatively with special reference to the needs of the person involved, so that it may have a healing effect and change the personality of the quondam criminal.³⁸

34. *Sunil Batra II*, (1980) 3 SCC 488, 522.

35. *Ibid.*

35a. *Ibid.*

35b. *Sunil Batra I*, (1978) 4 SCC 494, 565.

36. *Sunil Batra II*, (1980) 3 SCC 488, 511.

37. *Id.*, p. 511.

38. *Hiralal Mallick*, (1977) 4 SCC 44, 54.

(27) Undertrial prisoners should not be kept in leg irons contrary to prison regulations nor should be asked to work outside jail walls. This would be in flagrant violation of prison regulations and contrary to International Labour Organisation conventions against forced labour.³⁹

(28) The accused should be allowed to sit down in the court during the trial especially in long and arduous cases unless it is necessary for the accused to stand temporarily in cases such as identification. This facility is not against the established practice that everyone in the court should stand when the presiding officer enters.⁴⁰

(29) Where the President of India has rejected the petitions filed by the prisoners for commutation of their death sentence to imprisonment for life and the prisoners are willing to be interviewed by the press, the right of the press to interview the prisoners should not be denied. If in any given case there are weighty reasons for denying the opportunity to interview a condemned prisoner, the same should always be recorded in writing and the interview may be refused.⁴¹

Judicial Mandates in Matters of Bail and Speedy Trial

(1) The courts should abandon the antiquated concept under which pre-trial release is ordered only against bail with sureties. If the court is satisfied, after taking into consideration the information placed before it, that the accused has his roots in the community and is not likely to abscond, it can safely release the accused on his personal bond. To determine whether the accused has his roots in the community which would deter him from fleeing, the court should take into consideration the length of his residence in the community; his employment status, history and his financial conditions; his family ties and relationship; his reputation, character and monetary condition; his prior criminal record including any record or prior release on recognizance or on bail; the identity of the responsible members of the community who

39. *Kadra Pehadiya v. State of Bihar*, (1981) 3 SCC 671, 674.

40. See *Indian Express*, Chandigarh, December 9, 1981.

41. *Smt. Prabha Dutt v. Union of India*, (1982) 1 SCC 1.

would vouch for his reliability; the nature of the offence charged and the apparent probability of conviction and the likely sentence in so far as these factors are relevant in the risk of non-appearance, and any other factors indicating the ties of the accused to the community or bearing on the risk of wilful failure to appear.⁴²

(2) While releasing the accused on personal bond, the amount of the bond which the court fixes should not be merely based on the nature of the charge. It should be an individualized decision depending on the individual financial circumstances of the accused and the probability of absconding.⁴³

(3) The inquiry into the solvency of an accused can cause great harassment to him and often result in denial of bail and deprivation of liberty and should not, therefore, be insisted upon as a condition of acceptance of personal bond.⁴⁴

(4) When an undertrial prisoner is produced before a magistrate and he has been in detention for 90 days or 60 days, as the case may be, the magistrate *must*, before making an order of further remand to judicial custody, *point out* to the undertrial prisoner that he is entitled to be released on bail.⁴⁵

(5) To keep undertrials in prolonged detention is a torture and an affront to all civilized norms of human dignity. No procedure which does not ensure a reasonably quick trial can be regarded as 'reasonable, fair or just' and it would fall foul of Article 21. There cannot be any doubt that speedy trial means

42. See *supra*, note 1, *Hussainara Khatoon I-V*, (1980) 1 SCC 93. See also *Moti Ram v. State of M.P.*, (1978) 4 SCC 47.

43. (1980) 1 SCC 93, 97.

44. *Ibid.*

45. *Hussainara Khatoon V*, (1980) 1 SCC 108 at 110 (emphasis added). See Section 167(2) of Criminal Procedure Code, 1973. According to this section the total period of detention of the accused which a Magistrate can authorise shall not exceed.

(i) Ninety days, where the investigation relates to an offence punishable with death, imprisonment for life or imprisonment for a term not less than ten years, and

(ii) Sixty days, where the investigation relates to any other offence.

On the expiry of said period of ninety days or sixty days, as the case may be, the accused person shall be released on bail if he is prepared to and does furnish bail.

reasonably expeditious trial and it is an integral and essential part of the fundamental right to life and liberty enshrined in Article 21.⁴⁶

Judicial Mandates in matters of Legal Aid, Supply of Copy of Judgment and the Facility of Appeal

(1) Legal aid should be given to the poor prisoners to seek justice from prison authorities and, if need be, to challenge the decision in court. If lawyers' services are not given, the decisional process becomes unfair and unreasonable especially because the rule of law perishes for a disabled prisoner if counsel is unapproachable and beyond purchase. By and large, prisoners are poor, lacking legal literacy, under the trembling control of jailer, and unable to meet relations and friends to take legal action.⁴⁷

(2) The State government should provide at its cost a lawyer to the undertrial prisoner with a view to enabling him to apply for bail in the exercise of his right under proviso (a) to Section 167(2) and the magistrate should take care to see that the right of undertrial prisoner to the assistance of the lawyer provided at the State cost is secured to him.⁴⁸

(3) The right to counsel is not in the permissive sense of Article 22(1), but in the peremptory sense of Article 21 confined to prison situations.⁴⁹

(4) Where the prisoner is disabled from engaging a lawyer on reasonable grounds such as indigence or incommunicado situation, the court should, if the circumstances of the case, the gravity of the sentence, and the ends of justice so require, assign competent counsel for the prisoner's defence provided the party does not object.⁵⁰

(5) The State which prosecuted the prisoner and set in motion the process which deprived him of his liberty should pay to the assigned counsel such sum as the court may equitably fix.⁵¹

46. *Id.* at 1041, 1050. See also *Babu Singh v. State of U. P.*, (1978) 1 SCC 579; *State of Punjab v. Swaran Singh*, (1981) 3 SCC 34.

47. *Moti Ram v. State of M.P.*, (1978) 4 SCC 47.

48. *Hussainara Khatoon V*, (1980) 1 SCC 108 at 110.

49. *Madhav Hoskot*, (1978) 3 SCC 544 at 557.

50. *Ibid.*

51. *Ibid.*

(6) To make writ jurisdiction viable, 'free legal services to the prisoner' programme should be promoted by professional organisations recognised by the court, such as for example Free Legal Aids (Supreme Court) Society. The District Bar should also keep a cell for prisoners' relief.⁵²

(7) Courts should furnish a free transcript of the judgment when sentencing a person to prison term.⁵³

(8) In the event of any such copy being sent to jail authorities for delivery to the prisoner by the appellate, revisional or other court, the official concerned should, with quick despatch, get it delivered to the sentencee and obtain written acknowledgment thereof from him.⁵⁴

(9) Where a prisoner seeks to file an appeal or revision every facility for exercise of that right should be made available by the jail administration.⁵⁵

(10) The prison officials should send directly to the court petitions made to them by the prisoner from within the prison instead of routing through the higher authorities.⁵⁶

(11) Many of the victims happen to be poor, mute, illiterate, desperate and destitute and too distant from the law to be aware of their rights or ask for access to justice, especially when the running tension of the prison and the grisly potential for zoological reprisals stare them in the face. *So it is for the court to harken when humanity calls without waiting for particular petitions. Like class actions, class remedies have pro bone value.*⁵⁷

The Supreme Court also directed all the State governments in the country to convert these rulings bearing on prison administration into rules and instructions forthwith so that violation of the prisoner's freedom can be avoided and *habeas corpus* litigation may

52. *Sunil Batra II*, (1980) 3 SCC 488 at 517.

53. *Madhav Hoskot*, (1978) 3 SCC 544 at p. 557.

54. *Ibid.*

55. *Ibid.*

56. *Sunil Batra II*, (1980) 3 SCC 488.

57. *Id.*, pp. 506 (emphasis added).

not proliferate.⁵⁸ These broad lines are indicative of the direction of correction in prison reforms having constitutional testimony that a prisoner is a person and his personhood holds a promise of potential humanity which if unfolded makes a criminal a non-criminal. But the problem is, how far the State governments and prison administration have awakened to the call of prison justice to unfold the potentialities of the forgotten specimens of humanity—often visited with zoological reprisals? Everyday we hear the woes of prison torture and mass injustice in the prisons. To prevent this malady, what we need is the consciousness of human rights of the prisoners amongst the prison officials because they are the actual distributors of prison justice and are invested with wide discretion in the discharge of their official functions. As is well known, when we talk of discretion, it means a well channelised, a regulated discretion flowing within the parameters of constitutional justice. Do the prison officials exercise their discretion in constitutional terms? The incidents of prison torture and injustice disclosed in several of the judgments delivered by the apex court bear ample proof to the contrary. Thus we must find out a way to control the arbitrary exercise of discretion by the prison officials. In some quarters, the suggestion for prison *ombudsman* has been mooted out. It is submitted that we need such a watchdog machinery to control the highhandedness of prison officials and to listen to the grievances of prison torture, indiscriminate violence and injustice to the inmates.

Besides this, the prison personnel should be given regular training on the subject of basic human rights of the prisoners. They should be made aware that a prisoner is not denuded of his basic human rights merely because of incarceration. The widespread prevalence of legal illiteracy among the prison administrators about the rights of the prisoners is the main cause of prison injustice. The prison administrators should be made to understand that certain human rights are sacrosanct and inherent in the personality of the detenu and are not to be violated at any cost. The delinquent officers must be dealt with sternly and instead of being suspended and then reinstated when the

58. *Kishore Singh v. State of Rajasthan*, (1981) 1 SCC 503 at p. 509.

public fury is over, should be removed from service and be prosecuted for their commissions and omissions.

To protect the minimum rights of a detenu, it should be made obligatory upon the Sessions Judges to pay personal visits in the jails and to interview the prisoners falling under their jurisdiction. A clerk from the Sessions Court should carry around a complaint box every week and collect the complaints from the prisoners so that they can speak without fear and this box should be opened by the Sessions Judge personally. The educated and enlightened prisoners should be associated with Prison Reforms Committees to help carry out the necessary reforms. Prisoners in turn should also be made aware of their rights and must be provided with necessary machinery for seeking justice through the court. Newsmen should be allowed to visit the jails and meet the prisoners. The press will bring to light the day-to-day happenings in the jails without any delay and it will in turn act as a great check on the jail authorities.

It is hoped that if these suggestions are carried into effect, the much needed prison reform in terms of human values can be ensured to prison humanity and the constitutional promise of distributive justice can be made available to the prisoners—the hapless and helpless segment of the society.

LEGAL AID ETHOS AND MANDAMUS : SOME OBSERVATIONS

P. S. JASWAL

I. Introduction

The Constitution of India is the nidus of justice, social, economic and political.¹ But during the last thirty-four years it has given a tantalising hope, a frustrating report and a deficit balance to the indigent millions.² Of all labours, toils and efforts of human race, the choicest fruit which the seeds of human endeavour have borne is law and the administration of justice. To perpetuate the victory of righteousness and to eradicate the doing of wrong, though seemingly hidden and obscure, have always been the essence and crux of human activity. For, it is inherent in the nature of man and only in line with the divine image of which he is constituted that man should have a very strong sense of justice, of right and of wrong.³ The law derives its legitimacy from justice and the endpoint of law, therefore, must be justice. There should not be any disharmony between law and justice. Law must accord with justice. And when we talk of justice we mean social justice which takes in its compass not only a fortunate few belonging to the privileged class, but large masses belonging to underprivileged segments of the society.⁴ Justice, liberty and equality are the guiding principles of our Constitution and the noble promise of the Constitution will be fulfilled only if the justice is prompt and

* B. Sc., LL.M. (Gold Medalist, Pb.), Lecturer, Faculty of Law, University of Jammu, Jammu.

1. The Preamble of the Constitution of India, which sums up admirably well the hopes and aspirations of the people of our country, *inter alia*, provides to secure all its citizens 'justice, social, economic and political'.
2. V.R. Krishna Iyer: *Law versus Justice*, p. 10 (1980).
3. See author's 'Capital Punishment', *Panjab University Law Review*, Vol. XXXI, p. 197 (1979).
4. See Chairman's note in *Legal Aid Newsletter*, Vol. I, Part 1 (May 1981).

inexpensive.⁵ Either we should surrender to the justiceless law or we must inject the equal justice⁶ into legality and that can be done only by a dynamic and activist scheme of legal aid.

To provide equal justice is an age-old problem. The *Magna Carta* of 1215 also dealt with the same problem by providing: "To no one will we sell, to no one will we refuse, or delay the right of justice...."⁷ The purpose of legal aid is to enable the people to seek justice under the law. It is a formidable challenge in a country of India's size and heterogeneity.

With this backdrop in mind, an attempt has been made to highlight the statutory provisions regarding legal aid and to show how the right to legal aid has become a part of justice, fair and reasonable procedure. Attempt has also been made to anatomise the right of *mandamus* and judicial pessimism in those cases where the accused is asking the State to provide a lawyer of equal professional competence and of his choice at the State expense so as to secure the ends of justice with special reference to *Ranjan Dwivedi v. Union of India*.⁸

II. Statutory Developments

Unfortunately, the traditional system has operated to close the doors of justice to the poor and has caused gross denial of justice in all parts of the country to millions of people.⁹ However,

5. *Ibid.* See also V.R. Krishna Iyer, "Inaugural Address at the Second State Lawyers' Conference Andhra Pradesh at Rajmurti", (1976) 2 SCC 1, 4, where the learned judge has observed:

The spiritual essence of legal aid movement is said to consist in investing the law with human soul.

6. Article 14 of the Constitution provides: "The State shall not deny to any person equality before the law or equal protection of laws within the territory of India". The philosophy underlying the Constitution, reflected in the provision for equal protection of laws and in the chapter on Directive Principles, show that the Constitution is imbued with respect for human rights. That philosophy is sufficient to furnish inspiration for a provision that will put an end to the individual's discrimination that otherwise arises between person and person because of poverty. Where a poor man has to defend himself without a counsel, there is lacking that equality which is demanded by the spirit of the Constitution. See Law Commission of India, Forty-eighth Report (Some Questions under the Code of Criminal Procedure Bill, 1970), p. 9 (1972).
7. Clause 40 of *Magna Carta*.
8. (1983) 3 SCC 307 (hereinafter cited as *Ranjan Dwivedi*).
9. The need of the poor for justice had moved poet Ovid to write, "*Curia pauperibus clausa est*" (the courts are closed to the poor). Quoted by

the last decade is of significance in this respect, because legal aid is no longer a matter of charity or benevolence but is one of a civil right and the legal machinery itself is expected to deal specifically with it. Our State is a welfare State whose policies are inspired by the Directive Principles of State Policy. On the credit side of the balance sheet we must mention Article 39-A of the Constitution which deals with equal justice and free legal aid. It provides:

The State shall secure that the operation of the legal system promotes justice, on the basis of equal opportunity, and shall, in particular, provide free legal aid, by suitable legislation or schemes or in any other way, to ensure that opportunities for securing justice are not denied to any citizen by reason of economic or other disabilities.¹⁰

It gives constitutional status to the free legal services to the poor and envisions the prospect of inequality in access to justice being abolished.¹¹ Earlier certain doubts were expressed about the competence of Central Government to legislate on legal aid matters under the constitutional provisions. There was no specific entry as to legal aid in the Seventh Schedule. It was thought that it was covered under "Administration of Justice"¹² which was in List II of the Seventh Schedule. The Constitution (Forty-second Amendment) Act, 1976 has included the "administration of justice" in Entry 11-A of the Concurrent List. By this change now both Centre as well as the State Governments are competent to legislate on matters relating to legal aid.

In 1973, a new Code of Criminal Procedure was enacted and on the recommendations of Law Commission of India¹³, a specific Section 304 relating to legal aid was incorporated in it. The said section reads:

(1) Where, in a trial before the Court of Session, the

Cappalleti and Gordley: "Legal Aid", 28 *Stanford Law Review*, p. 347 (1972).

10. Added by the Constitution (Forty-second Amendment) Act, 1976, S. 8 (*w. e. f.* 3-1-1977).

11. V.R. Krishna Iyer: *Law versus Justice*, p. 66 (1980).

12. Entry 3 of List II, Seventh Schedule.

13. See Law Commission of India, Fourteenth Report (Reform of Judicial Administration), Vol. I, pp. 587-600 (1958). See also Law Commission of India, Forty-eighth Report, (Some Questions under the Code of Criminal Procedure Bill, 1970), pp. 8-9 (1972).

accused is not represented by a pleader, and where it appears to the Court that the accused has not sufficient means to engage a pleader the Court shall assign a pleader for his defence at the expense of the State.

(2) The High Court may, with the previous approval of the State Government, make rules providing for—

- (a) the mode of selecting pleaders for defence under sub-section (1);
- (b) the facilities to be allowed to such pleaders by the Courts;
- (c) the fees payable to such pleaders by the Governments, and generally, for carrying out the purposes of sub-section (1).

(3) The State Government may, by notification, direct that as from such date as may be specified in the notification, the provisions of sub-sections (1) and (2) shall apply in relation to any class of trials before other Courts in the State as they apply in relation to trials before Courts of Session.¹⁴

In addition to this change, Article 22(1)¹⁵ of the Constitution was also a source of inspiration to the framers of this Code. Keeping in view its tenor, Section 303 (New Code) replacing Section 340(1) (Old Code) was incorporated with the addition of significant words "*of his choice*" at the end.¹⁶

It is submitted that these changes are of great significance in understanding the intention of the framers of the new Code. It is interesting to note that the words "*of his choice*" were not added in the new Section 304 which specifically dealt with legal

14. Section 304 of the Criminal Procedure Code, 1973.

15. Article 22(1) provides: "No person who is arrested shall be detained in custody without being informed, as soon as may be, of the grounds for such arrest nor shall he be denied the right to consult, and to be defended by, a legal practitioner of his choice."

16. Section 303 which deals with the right of person against whom proceedings are instituted to be defended, provides: "Any person accused of an offence before a Criminal Court, or against whom proceedings are instituted under this Code, may of right be defended by a pleader of *his choice*", (emphasis is of the author).

aid. It is submitted that the omission was deliberately made because Section 304 of Criminal Procedure Code, 1973 and Article 22(1) of the Constitution of India are analogous.¹⁷ The statutory provisions in Section 304 cannot override the constitutional guarantee under Article 22(1) and statutory change in Section 303, '*of his choice*', has to be kept in mind.¹⁸ In other words, even when the other conditions of Section 304 are fulfilled, the court cannot thrust upon the accused a lawyer to whose appointment he objects.¹⁹ Otherwise the whole scheme of legal aid will crumble down.

Besides this, an important development with regard to legal aid took place when the Supreme Court held the provision of legal aid was a part of 'just, fair and reasonable' procedure under Article 21 of the Constitution of India²⁰, and thus making it a fundamental right.

III. Legal Aid and the Jurisprudence of Just, Fair and Reasonable Procedure

In *Maneka Gandhi v. Union of India*²¹, the Supreme Court expanded the wings of personal liberty as enshrined in Article 21 of the Constitution. The Supreme Court speaking through Justice Bhagwati observed that the procedure established by law should be 'just, fair and reasonable' and not arbitrary, fanciful or oppressive, otherwise it would be no procedure at all and the requirements of Article 21 would not be satisfied.²² In other words, the procedure must satisfy the requirements of natural justice. The correct way of interpreting the provisions conferring fundamental rights is that the attempt of the court should be to expand the reach and ambit of fundamental rights rather than to attenuate their meaning and content by a process of judicial construction.

17. See Durga Dass Basu: *Criminal Procedure Code*, 1973, pp. 672-73 (1979).

18. *Sadhan v. State*, 1978 Cri LJ (NOC) 131 (Cal).

19. *Ibid.*

20. Article 21 provides: "No person shall be deprived of his life or personal liberty except according to the procedure established by law."

21. (1978) 1 SCC 248.

22. *Id.*, p. 624.

Relying on this famous decision, Krishna Iyer, J. who delivered the majority judgment in *M. H. Hoskot v. State of Maharashtra*²³, held that the right to legal aid is one of the ingredients of fair procedure. He pointed out that the benefit of Article 39-A is available in those cases where the court thinks that the *public justice suffers*. He observed:

The court may judge the situation and consider from all angles whether it is necessary for the ends of justice to make available legal aid in the particular case.²⁴

In *Hussainara Khatoon v. State of Bihar*²⁵, Bhagwati, J. held that free legal aid is a part of the fair procedure under Article 21. Free legal aid is "State's duty and not Government's charity".²⁶

Bhagwati, J. again in *Sheela Barse v. State of Maharashtra*²⁷ observed: "... Legal assistance to poor or indigent accused... is a constitutional imperative mandate not only by Article 39-A but also by Articles 14 and 21 of the Constitution."²⁸ He further observed:

It is a necessary *sine qua non* of justice and where it is not provided, injustice is likely to result and undeniably every act of injustice corrodes the foundation of democracy and rule of law, because nothing rankles more in the human heart than a feeling of injustice and those who suffer and cannot get justice because they are priced out of the legal system, lose faith in the legal process and feeling begins to overtake them that democracy and the rule of law are merely slogans or myths intended to perpetuate the domination of the rich and powerful and to protect the establishment and the vested interests.²⁹

Thus from the above decisions it is clear that the right to legal aid as provided in Article 39-A as directive principle has been read by the Supreme Court as fundamental right in

23. (1978) 3 SCC 544.

24. *Id.*, pp. 1556-58.

25. (1980) 1 SCC 98, 103: See also *Superintendent and Remembrancer of Legal Affairs West Bengal v. S. Bhomick*, (1981) 2 SCC 109; *Khatri v. State of Bihar*, (1981) 1 SCC 635; *State of Haryana v. Darshana Devi*, (1979) 2 SCC 236.

26. See P.N. Bhagwati: *Law and the Commonwealth*, p. 220 (1971).

27. (1983) 2 SCC 96.

28. *Ibid.*, p. 99 (emphasis is of the author).

29. *Ibid.*, pp. 99-100.

Article 21 of the *Magna Carta* of India.³⁰ Indeed Parts III and IV, viewed in the perspective of the Preamble, underscore social justice as the warp and woof of the constitutional order.³¹ Those two parts were incorporated in our Constitution with the hope and expectation that one day the tree of true liberty would bloom in India. They connect India's future, present and past adding greatly to the significance of their inclusion in the Constitution, and giving strength to the pursuit of social revolution in India.³² And the inter-penetration of the personality of Articles 14, 21, 22(1) and 39-A fertilizes the system to produce a conclusion that the right to legal aid is a fundamental right and the consultation should be of free choice.³³

Thus the right to counsel is not there in the permissive sense of Article 22(1) but in its widest amplitude in pre-emptory sense of Article 21 so as to enable the citizen to get *mandamus* against the State, directing the State to provide sufficient funds for legal assistance. In case of default of this constitutional mandate, the State as well as the trial by the magistrate might run the risk of contravening Article 21.³⁴

IV. Right to Mandamus and Judicial Pessimism

*Ranjan Dwivedi*³⁵ is a case where the Supreme Court has relegated to position of secondary importance the prosilient development in the legal aid jurisprudence. Briefly, the facts were: The petitioner was a practising advocate in the Supreme Court and was arraigned in an offence punishable under Section 302 read with Section 120-B of the Indian Penal Code. He filed a

30. Part III of the Constitution of India which deals with Fundamental Rights is also described as 'Magna Carta' of India, See V.G. Ramachandran: *Fundamental Rights and Constitutional Remedies*, Vol. I, p. 1 (1964).

31. V.R. Krishna Iyer: *Law versus Justice*, p. 69 (1980).

32. See Granville Austin: *The Indian Constitution: Cornerstone of a Nation*, pp. 50-51 (1976 reprint).

33. See V.R. Krishna Iyer: *Of Law and Life*, p. 140 (1979). In *Hussainara Khatoon v. State of Bihar*, (1980) 1 SCC 98, p. 105, the Supreme Court observed that the right to legal aid is not only a mandate of equal justice implicit in Article 14 and right to life and liberty in Article 21 but also the compulsion of constitutional directive in Article 39-A.

34. See *Zerolima v. Govt. of Mizoram*, 1981 Cri LJ 1736 (Gau).

35. (1983) 3 SCC 307.

writ petition under Article 32 and sought issuance of writ of *mandamus* for ordaining the Union of India to give financial assistance to him to engage counsel of his choice on a scale equivalent to or commensurate with the fees payable to the counsel appearing for the State. He contended that he as a struggling lawyer had neither the capacity nor the means to engage a competent lawyer for his defence. The meagre sum of Rs. 24 per day fixed under the rules framed by the Delhi High Court as fees to a lawyer appearing in the Session Court as *amicus curiae* was insufficient for a lawyer of good standing. The prosecution was being conducted by a special public prosecutor assisted by a galaxy of lawyers and large amounts were being paid by the State as their fees and, therefore, as a matter of processual fairplay it was incumbent on the State to provide him with a counsel for his defence on the basis of equal opportunity as guaranteed under Article 39-A. During the pendency of the writ petition, the court by its interim order directed the State to pay Rs. 500 per day to the senior counsel and Rs. 250 per day to the junior for representing the petitioner. The State questioned the maintainability of the writ petition on the ground that the direction to provide defence counsel at State expense could be made only when an application under Section 304(1) of Criminal Procedure Code was made.³⁶

Unfortunately, the Supreme Court gave a jolting shock to the development of legal aid jurisprudence and dismissed the petition. A number of constitutional issues were decided.

(A) *Ambit of Article 22(1) and counsel of one's choice at the State expense*

Justices A.P. Sen and R.S. Pathak constituted the bench. Justice Sen, speaking for the court, posed a very pertinent question in the beginning of his judgment: Whether the 'right to be defended by a legal practitioner of his choice' under Article 22(1) of the Constitution comprehends the right of an accused to be supplied with a lawyer by the State.³⁷

If the answer to this question is given in the affirmative then

36. *Ibid.*, pp. 309-11.

37. *Ibid.*, p. 309.

there is no difficulty because the writ of *mandamus* can be issued under Article 32 of the Constitution³⁸ for the enforcement of the fundamental right. It is heartening to note that Justice Sen in his judgment admitted :

*The traditional view expressed by this court on the interpretation of Article 22(1) of the Constitution in Janardan Reddy v. State of Hyderabad that 'the right to be defended by a legal practitioner of his choice' could only mean a right of the accused to have the opportunity to engage a lawyer does not guarantee an absolute right to be supplied with a lawyer by the State, has now undergone a change by the introduction of the Directive Principle of the State Policy embodied in Article 39-A by the Constitution (Forty-second) Amendment Act, 1976, and the enactment of sub-section (1) of Section 304 of the Code of Criminal Procedure.*³⁹

He further observed :

There had been a definite shift in the stance adopted by the court by its decisions in *Maneka Gandhi v. Union of India*⁴⁰, *E.P. Royappa v. State of T.N.*⁴¹ and *R.D. Shetty v. International Airports Authority of India*⁴². . . . Read with Article 21, the Directive Principle in Article 39-A has been taken cognizance of by the court in *M.H. Hoskot v. State of Maharashtra*⁴³, *State of Haryana v. Darshana Devi*⁴⁴, and *Hussainara Khatoon (IV) v. (Home) Secretary, State of Bihar*⁴⁵, to lead to certain guidelines in the administration of justice. One of these is that when the accused is unable to engage a counsel owing to poverty on similar circumstances, *the trial would be vitiated unless*

-
38. Article 32(2) provides: "The Supreme Court shall have power to issue directions or orders or writs, including writs in the nature of *habeas corpus*, *mandamus*, *prohibition*, *quo warrant*o and *certiorari*, whichever may be appropriate for the enforcement of any of the rights conferred by this Part." *Mandamus* is a judicial remedy which is in the form of an order from a superior court to any government, court, corporation or public authority to do or to forbear from doing some specific act which that body is obliged under law to do or to refrain from as the case may be and which is in the nature of a public duty and in certain cases of a statutory duty. See A.T. Markose: *Judicial Control of Administrative Action in India: A Study in Methods*, p. 364 (1956).
39. (1983) 3 SCC 307, 312 (emphasis is of the author).
40. (1978) 1 SCC 248.
41. (1974) 4 SCC 3.
42. (1979) 3 SCC 489.
43. (1978) 3 SCC 544.
44. (1979) 2 SCC 236.
45. (1980) 1 SCC 98.

*the State offers free legal aid for his defence to engage a lawyer whose engagement the accused does not object.*⁴⁶

In spite of these observations, the learned judge failed to arrive at the right conclusion that 'the right to be defended by a legal practitioner of his choice' under Article 22(1) of the Constitution comprehends the right of an accused to be supplied with a lawyer by the State. In fact, Article 22 only supplements Article 21 which through the judicial interpretations includes the right of an accused to have free legal aid.⁴⁷

It is submitted that in the present case, the petitioner is asking for the enforcement of his fundamental right *i.e.* to have a 'counsel of his choice'. His fundamental right to have a 'counsel of his choice' has already been admitted by the court in view of the changed trend. Now it is the duty of the court to provide a counsel⁴⁸ whose appointment he does not object to. The *mandamus* has become the writ of justice in India. And in all those cases where the citizen's need is the proper adjudication of his matter a *mandamus* is inevitable.⁴⁹ Here in this case the petitioner's plea is that the prosecution is being conducted by a special public prosecutor of a very high standing and supported by a galaxy of other lawyers and large amounts are being paid as their fees.⁵⁰ Now for the proper adjudication of his case, it is a must that the lawyer who is provided by the State should be of equal standing otherwise the idea of justice implicit in legal aid will fail.

(B) *Professional competence of a lawyer and equal justice*

Unless the lawyer provided by the State is of equal competence as that of special public prosecutor, it will violate the fundamental right to equality which is the founding faith of the

46. (1983) 3 SCC 307, 312-13 (emphasis is of the author).

47. (1983) 2 SCC 96, 99.

48. Recently, P & H High Court in *Smt. Daljit Kaur v. Estate Officer, Chandigarh Administration*, AIR 1983 NOC 218 (P & H), also expressed the view that writ of *mandamus* can be granted only when the petitioner has right to compel the performance of some duty cast on the opponent.

49. Markose: *Judicial Control of Administrative Action in India: A Study in Methods*, p. 376.

50. (1983) 3 SCC 307, 310.

Constitution.⁵¹ In *R.M. Wasawa v. State of Gujarat*⁵², Justice Krishna Iyer remarked :

Indigence should never be a ground for denying fair trial or equal justice. Therefore, particular attention should be paid to appoint competent advocates, equal to handling the complex cases, not patronising gestures to raw entrants to the Bar.⁵³

In *Ranjan Dwivedi* the Supreme Court also admitted that it is impossible for a person facing a sessions trial on a capital charge to get a competent professional lawyer under the present scales of fees as prescribed by the Delhi High Court.⁵⁴ It was due to this fact that the Supreme Court by its interim order directed the State to pay Rs. 500 per day to the senior counsel and Rs. 250 per day to the junior for representing the petitioner.⁵⁵ Despite this one fails to understand Justice Sen's helplessness in resolving *Ranjan Dwivedi's* dilemma.

It is submitted that the legal aid programme is not a benefit scheme for briefless lawyers, as some suspect, but provision of assistance through counsel and of other facilities for effective defence.⁵⁶ Lawyer's service not of tyros, but competent men lest the scheme be discredited, is required. Legal aid must not only be given but appear to be given and the legal aid litigant must have some freedom of choice. The practice of patronising lawyers instead of choosing talent according to the case needs to be condemned, even if the selection were made by judicial officers.⁵⁷

(C) *Due Process Clause and its wavering interpretations*

American judicial history of legal aid reminds us about the liberal change in the attitude of the judges in providing counsel

51. Equality in the administration of justice thus forms the basis of our Constitution. Such equality is the basis of all modern systems of jurisprudence and administration of justice. If the justice becomes unequal then the laws which are meant for protection have no meaning and to that extent fail in their purpose. See Law Commission of India, Fourteenth Report, Vol. I, p. 587.

52. (1974) 3 SCC 581.

53. *Ibid.*, pp. 1143-44 (emphasis is of the author).

54. (1983) 3 SCC 307, 316.

55. *Ibid.*, p. 311.

56. V.R. Krishna Iyer: *Of Law and Life*, p. 141.

57. *Ibid.*, p. 143.

at State expense.⁵⁸ In *Ranjan Dwivedi*, Justice Sen discussed the development of American legal aid jurisprudence at length⁵⁹, and in this process made two contradictory observations. While commenting upon the change which has been brought about by *Maneka Gandhi* and other cases in the rule enunciated by the American Supreme Court in *Powell v. Alabama*⁶⁰, Justice Sen, at the first place observed :

It is difficult to hold in view of these decisions that the substance of American doctrine of 'due process' has not still been infused into the conservative text of Article 21.⁶¹

But unfortunately this observation was ignored by him when at a later stage he commented upon the *Gideon's case* which rejected *Betty's case* and held that the 'Sixth Amendment's (unqualified) guarantee of counsel for all indigent accused' was a "fundamental right made obligatory upon the State by Fourteenth Amendment". At this place Justice Sen observed :

We are however not in United States of America and therefore not strictly governed by the 'due process' clause in the Fourteenth Amendment.⁶²

It is submitted that it was this fact which led him to ignore the fundamental right of the petitioner and hence dismissal of his petition. If he could have stood by his earlier approach then there was no difficulty and the Supreme Court through the writ of *mandamus* could have directed for providing adequate funds to have the counsel of competence and of petitioner's choice. It is further submitted that after the decision of *Maneka Gandhi*, the 'due process' clause has virtually been introduced by the Supreme Court in Article 21 of the Constitution of India.

(D) *Legislative silence and judicial dicta*

In *Ranjan Dwivedi*, reliance has also been put on Section 304 of Criminal Procedure Code where the counsel is provided at the

58. See *Powell v. Alabama*, 287 US 45; *Betty v. Brady*, 316 US 455; *Gideon v. Wainwright*, 372 US 335.

59. (1983) 3 SCC 307, 312-15.

60. 287 US 45.

61. (1983) 3 SCC 307, 312.

62. (1983) 3 SCC 307, 315.

State expense only in trial before the court of sessions. The Law Commission's Forty-eighth Report, which suggested making provision for all accused who are undefended by a lawyer for want of means, still remains to be implemented.⁶³

It is submitted that the courts are under an obligation to uphold the Constitution over the dictates of any organ of the State, even the legislature.⁶⁴ And *mandamus* in India need not wait even at the portals of Parliament or State legislature. Judiciary is the watchdog of individual's freedom and where the legislature has failed to epitomize the hopes and expectations of the millions, the judiciary must come forward and must protect not the millionaires but millions. The judiciary is not to run subsidiary to legislature or executive, but it has to maintain its independence and this particular aspect of independence of judiciary is a basic structure of our Constitution as propounded by the Supreme Court in *Kesavananda Bharati v. State of Kerala*.⁶⁵ In no case it can belie the hopes of millions by saying that since the legislature has not implemented the particular legislation, it cannot provide justice. In any case, with a Republican Constitution it is hardly justifiable to say that *mandamus* cannot respond to the needs of individual cases. It is submitted that *mandamus* is an efficient judicial weapon in the legal armoury. It is a delicate, but a potent, remedy and is intended to amplify justice and to preserve a right.

(E) *Mandamus: A remedy to a judicial discretion and delays*

The Supreme Court in *Ranjan Dwivedi* has suggested that the remedy with the petitioner is to make an application before the Additional Sessions Judge making out his case for the grant of free legal aid and if he is satisfied that the requirements of Section 304(1) of the Code are fulfilled then he shall make necessary directions in that behalf. While fixing the amount to be paid to *amicus curiae* the interim order shall be kept into consideration. But if he feels that he is bound by the constraints

63. *Ibid.*

64. In this connection see *Raj Narain Singh v. Atmaram Govind Kher*, AIR 1954 All 319, 338-40.

65. (1973) 4 SCC 225.

of the rules framed by the Delhi High Court regarding the scales of remuneration, he shall make reference to the High Court which under Article 227(3)⁶⁶ shall consider it. The Supreme Court further observed that whether the scales of remuneration prescribed for empanelled lawyers appearing in sessions trial are grossly insufficient and call for a revision is a matter which clearly rests with the High Court and we wish to say no more.⁶⁷ The Supreme Court also admitted that the existing rules are wholly antiquated and do not take into account the realities of the situation.

It is submitted that in view of the said observations, the Supreme Court should have issued the writ of *mandamus* to direct the High Court to amend its rules regarding the scales of remuneration to *amicus curiae*. It is further submitted that the whole procedure anticipated by the Supreme Court may result in the delay of justice. Moreover, the High Court has been given the discretion to frame such rules under Section 304(2) of the Criminal Procedure Code and a constitutional duty has been imposed on it under Article 227(3) of the Constitution. If the High Court has failed to carry out the constitutional mandate according to the spirit of the Constitution then in that case the Supreme Court should have directed through the writ of *mandamus* the High Court that it should fulfil the constitutional mandate. Otherwise the whole *Magna Carta* of India will become a 'dead letter'.

It is submitted that *mandamus* is a writ of justice and is issued wherever justice is delayed or denied. Leaving the discretion of framing the rules regarding the payment to *amicus curiae* in the hands of the High Court *only* is also not just, fair and reasonable procedure which is a part of natural justice. In doing so the principles of natural justice which have become a part of Article 21⁶⁸ are violated which can be rectified through the writ of

66. Article 227(3) provides: "The High Court may also settle tables of fees to be allowed to the sheriff and all clerks and the officers of such courts and to attorneys, advocates, and pleaders practising therein."

67. (1983) 3 SCC 307, 316, cf. *S.K. Bhatia v. State of U.P.*, (1983) 4 SCC 194.

68. See *Maneka Gandhi v. Union of India*, (1978) 1 SCC 248: p. 285.

mandamus. Natural justice is fairplay in action. And the concept of natural justice should at all stages guide those who discharge judicial functions not merely an acceptable but as an essential part of the philosophy of law.⁶⁹ Indeed, natural justice is a pervasive facet of secular law where a spiritual touch enlivens legislation, administration and adjudication to make fairness a creed of life.^{69a}

It is further submitted that the exercise of the discretion should always be for the purposes which are contemplated by the law. And whenever either they are neglected or there is delay in the exercise of discretion in framing the rules, as is evident on the part of Delhi High Court in *Ranjan Dwivedi*, the *mandamus* is the immediate remedy. It is submitted that while exercising any discretion the following principles should be observed :

1. The discretion must be exercised judicially.
2. The court in exercising the discretion should not fail to apply the established principles of law e.g. the principles of natural justice.
3. The court while exercising discretion should not wrongly apply the well established principles of law.
4. When duty is discretionary then so long it is not properly exercised it should still be considered as not exercised.

It is further submitted that by applying these principles, the Supreme Court should have issued the writ of *mandamus* so as to achieve the ends of justice. One of the principles which is firmly embodied in the system of jurisprudence that is administered in India is that justice must not only be done but appear to be done.⁷⁰ But vice-versa is true in *Ranjan Dwivedi*.

(F) *Enforceability of Article 39-A*

In *Ranjan Dwivedi*, the Supreme Court was also wrong when

69. See *Wiseman v. Borneman*, 1971 AC 297.

69a. *Mohinder Singh Gill v. Chief Election Commissioner*, (1978) 1 SCC 405, 432.

70. See *Ramdhari v. State*, AIR 1954 All 645; *Maneka Lal v. Prem Chand*, AIR 1957 SC 425; *A.K. Kraipak v. Union of India*, (1969) 2 SCC 262.

it agreed with the chicanery of the learned Additional Solicitor-General while dismissing the petition on the ground that the petition is virtually for the enforcement of the Directive Principles of State Policy enshrined in Article 39-A of the Constitution.⁷¹

The Supreme Court in *Ranjan Dwivedi*, while making reference to *Kesavananda Bharati v. State of Kerala*⁷², admitted :

There is no disharmony between the Directives and the Rights because they supplement each other in aiming at the same goal of bringing about a social revolution and the establishment of welfare State which is envisaged in the Preamble. The courts therefore have a responsibility in so interpreting the Constitution as to ensure implementation of the Directives and to harmonize the social objective underlying the Directives with the individual rights. Primarily, the mandate in Article 39-A is addressed to the legislature and the executive but...the courts too are bound by this mandate.⁷³

In spite of this observation the Supreme Court in this case failed to observe this constitutional mandate. Let it not be forgotten that although the Directive Principles are not fundamental but they are fundamental in the governance of the country.⁷⁴ And what is fundamental in the governance of the country should not be taken lightly. In *Mumbai Kamgar Sabha v. Abdulbai*⁷⁵, the Supreme Court observed: "Where two judicial choices are available the construction in conformity with the social philosophy of Part IV has preference."⁷⁶ It was with this hope that Parliament enacted Article 39-A into Part IV of the Constitution and also amended Article 31-C.⁷⁷ Unfortunately this amendment of Article 31-C suffered a serious blow in *Minerva Mills v. Union of India*⁷⁸, where it struck down the amended part of Article 31-C and established the pre-forty-second amendment position. But a ray of hope generated for millions of destitute

71. (1983) 3 SCC 307, 311.

72. (1973) 4 SCC 225.

73. (1983) 3 SCC 307, 313.

74. See Article 37 of the Constitution of India.

75. (1976) 3 SCC 832.

76. *Ibid.*; p. 846.

77. By the Constitution (Forty-second Amendment) Act, 1976 'all or any of the principles' in place of Article 39(b) and (c) were added.

78. (1980) 2 SCC 591 : (hereinafter cited as *Minerva Mills*).

and downtrodden people from the dissenting opinion of Justice Bhagwati in this case. And it is heartening to note that recently the Supreme Court in *Sanjeev Coke Mfg. Co. v. Bharat Coking Coal Ltd.*⁷⁹, in a bench of five judges criticized⁸⁰ the majority decision of *Minerva Mills* case. It is submitted that the protection cannot be denied on the ground that the objectives set out in the Preamble have not been realized even after a few years. The matter must be viewed in the light of the needs of the future.⁸¹

Recently the Delhi High Court gave a clarion call in the case of *Jackson v. Union of India*.⁸² The High Court heralded a significant development when it allowed the writ of *mandamus* in order to enforce the directive contained in Article 39-A. In this case the petition under Article 226 of the Constitution was filed by three workmen (chowkidars) working with the Garrison Engineer (North), M.E.S., Air Force Palam, Delhi Cantt. raising an issue of great public importance regarding the suspension of industrial adjudication in the Central Government Labour Court for the last nine months. The reason for suspension was that for about a year no Presiding Officer was appointed to the said court by Union of India and there were about 1600 cases pending in this court.⁸³ Justice S.B. Wad, speaking for the court, observed:

Non-filling of the vacancies in the courts for a long period is one of the reasons for the amounting of arrears in our courts. Legal aid is one of the directive principles of the Constitution. The object of this directive is that nobody should be denied access to courts. . . . In this circumstance of the present case the petitioners are entitled to the *mandamus* sought for by them.⁸⁴

79. (1983) 1 SCC 147.

80. *Ibid.*, pp. 158-161.

81. *Ibid.*, p. 170.

82. AIR 1983 Del 558. A division bench of Punjab and Haryana High Court issued a writ of *mandamus* on March 20, 1984 directing the State of Haryana to fill the vacancies of Presiding Officers of the Industrial Tribunal, Faridabad as well as the Labour Courts at Faridabad and Rohtak by April 6, while allowing the writ petition filed by Raghbir Singh, General Secretary, Haryana Committee of the A.I.T.U.C. and Trade Union Leader of Panipat.

82a. See *Indian Express*, Chandigarh edition dated 21 March, 1984, p. 5.

83. AIR 1983 Delhi 558.

84. *Ibid.*, p. 560.

Justice Wad also observed :

The Socialist Republic of ours should not allow to create an impression... that the Directive Principles... are not seriously acted upon.⁸⁵

Thus in this case the importance of the Directive Principles, particularly of Article 39-A, was emphasized and the High Court issued the writ of *mandamus* to enforce this directive. But it is strange to note that the Supreme Court in *Ranjan Dwivedi* rejected the petition on the ground that there the petitioner was virtually asking for the enforcement of the directive contained in Article 39-A.

It is submitted that Article 39-A of the Constitution which emphasizes free legal aid is an inalienable element of reasonable, fair and just procedure and it has been held to be implicit in the guarantee of Article 21 which is fundamental right of the individual.⁸⁶ So even if *Ranjan Dwivedi* was asking for the enforcement of the directive in Article 39-A, the Supreme Court should have enforced it through the writ of *mandamus* because now it has become a fundamental right as implicit in Article 21. In other words, the petitioner was asking for the enforcement of Article 21.

It is submitted that today the underprivileged segments of our society are clamouring for their rights and are seeking the intervention of the Court with touching faith and confidence. The judges of the Court have a duty to redeem their constitutional oath and do justice no less to the pavement dweller than to the guest of a five star hotel.⁸⁷ It is suggested that in order to meet the economic strain for legal aid, whenever the case is won by the party provided with legal aid, the court should award costs against the other party and this cost awarded by the court should constitute a part of the legal aid fund.^{87a}

It is further submitted that the edifice of our Constitution is built upon the concept crystallised in the Preamble. Therefore,

85. *Ibid.*, p. 559.

86. See *Hussainara Khatoon v. State of Bihar*, (1980) 1 SCC 98, p. 103.

87. *Randhir Singh v. Union of India*, (1982) 1 SCC 618, 619.

87a. This kind of practice is being followed in Tanzania.

while interpreting the Constitution or any other statutory or procedural laws the touchstone of the Directive Principles of State Policy in the light of the Preamble will provide a reliable yardstick to hold one way or the other.⁸⁸ It must be in consonance with the ethos and spirit of the Constitution. Hence the right to legal aid needs to be looked at in this perspective. Courts are the interpreter of laws and final arbiters of justice. An aggrieved citizen can get his wrong redressed or interests determined through the instrumentality of the courts. Judges, therefore, must be active dispensers, not passive umpires. To conclude, in the apt words of Krishna Iyer:

The judiciary will die out like the dinosaurs if it dismisses the claimants' demand of the 21st century and hibernate in the frozen layers of the 19th century.⁸⁹

88. *D.S. Nakara v. Union of India*, (1983) 1 SCC 304.

89. V.R. Krishna Iyer: *Law versus Justice*, p. 130 (1980).

LEGAL AID AND LEGAL ADVICE IN M. P. : A PROTECTING ARM OF THE STATE TO THE WEAKER SECTIONS OF THE SOCIETY

G. P. TRIPATHI

The idea of legal aid owes its origin to the medieval justices of the King of England who visited the country to know the well-being of his subjects. On that occasion, one Alice, daughter of Piers Knotte, appeared before the Royal Courts and cried for justice and said that 'Alice can get no justice at all, seeing that she is poor and this Thomas is rich'. She told the Royal Court that she had no one who could plead her case and prayed, "for God's sake, sir justice, think of me for I have none to help me save God and you."

The challenge thrown by the story of Alice was well attended by those on whom it was thrown and it was Justice Bhagwati of Bombay High Court on whom the responsibility to meet the challenge was handed over as Chairman of the Committee on Legal Aid and Legal Advice in State of Bombay in the year 1949 (March). The Committee studied the question of the grant of legal aid in civil and criminal matters to persons of limited means or backward classes. Within 8 months, the detailed report was submitted. The Committee linked the responsibility to provide legal aid with equality clause of Article 14 and concluded it to be condition precedent before the protection to Article 14 could be secured and hence recommended it to be the responsibility of the State to provide free legal aid to those who could not have access to courts of law due to lack of means and guidance. It recommended four tiers of machinery for giving legal aid, *Taluka*, District, Greater Bombay and State level. The State of West Bengal followed the line when Harries Committee was

* LL.M. (Alld.), Ph.D. (Alld.), Professor and Head, Department of Law and Dean, Faculty of Law, Dr. Hari Singh Gour Vishwavidyalaya, Sagar (M.P.).

appointed in the same year. The reports of these committees could not be implemented for want of requisite funds. In 1958, the Law Commission of India in its Fourteenth Report devoted whole chapter on legal aid with a strong plea to implement Bhagwati and Harries Reports. The Commission stressed arranging legal aid by providing counsel at the cost of State to needy persons without means in jail appeals and other criminal proceedings specially those triable by court of sessions. It recommended that word 'pauper' used in Order 33 of C.P.C. be substituted by words 'poor persons or assisted persons' to provide way for giving legal aid. In 1960 came the Union scheme of legal aid followed by a clear directive at State Law Ministers' Conference in 1962 to give statutory base to the idea of legal aid. The All-India Lawyers' Conference 1962 did a lot by resolving that legal aid was State obligation and should accordingly be arranged specially in cases of maintenance of wives and children and jail appeals. In 1970, the National Conference on Legal Aid was held at New Delhi. It insisted on giving statutory force to legal aid schemes.

The State of M.P. took up the matter and passed Act 26 of 1976 under the title of the *Madhya Pradesh Samaj Ke Kamjor Vargon Ke Liye Vidhik Sahayata Tatha Vidhik Salah Adhiniyam*, 1977. There are 47 sections in the Act divided into seven chapters. The objects of the Act are to provide juridical basis for legal aid and legal advice to the weaker sections of the people, to bring the system of justice within their reach and thereby make the legal process a surer means of delivering social and economic justice. The Act defines aided person¹, Board², Committee³, family⁴,

-
1. "Aided person" means a person to whom—
 - (i) legal aid is provided; or
 - (ii) legal advice is given;
 in accordance with the provisions of this Act. [Section 2(b)]
 2. "Board" means the Madhya Pradesh Legal Aid and Legal Advice Board constituted under Section 3. [Section 2(b)]
 3. "Committee" means the district legal aid and legal advice committee or the *tehsil* legal aid and legal advice committee, as the case may be. [Section 2(c)]
 4. "Family" includes :
 - (i) the wife or husband, as the case may be, of a person whether residing with that person or not but does not include a wife or husband,

Landless agricultural labourer⁵, Legal Advice⁶, Legal Aid⁷, Legal Practitioner⁸, Legal Proceeding⁹, Rural artisan¹⁰, Scheduled Caste¹¹ and Scheduled Tribe.¹²

Authorities under the Madhya Pradesh Samaj Ke Kamjor Vargon Ke Liye Vidhik Sahayata Tatha Vidhik Salah Adhiniyam, 1976 (M.P. Act 26 of 1976)

The Act provides for the constitution and function of three bodies; Madhya Pradesh Legal Aid and Legal Advice Board (Sections 3, 4, 5 and 8), District Legal Aid and Legal Advice Committee (Section 6), Tehsil Legal Aid and Legal Advice

as the case may be, separated from that person by a decree or order of a competent court;

- (ii) son or daughter or step-son or step-daughter of a person and wholly dependent on him, but does not include a child or step-child of whose custody that person has been deprived of by or under any law for the time being in force;
- (iii) any other person related whether by blood or marriage to a person or to that person's wife or husband, as the case may be, and wholly dependent on that person. [Section 2(d)]
- 5. "Landless agricultural labourer" means a person who does not hold any agricultural land and whose principal means of livelihood is manual labour on agricultural land. [Section 2(e)]
- 6. "Legal advice" includes advice given and assistance recorded in accordance with the provisions of this Act for avoidance of vexatious and unnecessary litigation in any form. [Section 2(f)]
- 7. "Legal aid" means the legal aid specified in Section 36. [Section 2(g)]
- 8. "Legal practitioner" shall have the meaning assigned to that expression in the Advocates Act, 1961 (25 of 1961). [Section 2(h)]
- 9. "Legal proceeding" means civil, criminal or revenue action from its inception to its final disposal in a court of law and includes preparatory steps for institution of such action. [Section 2(i)]
- 10. "Rural artisan" means a person who does not hold any agricultural land and—
 - (i) whose principal means of livelihood is production or repair of traditional tools, implements and other articles or things used for agriculture or purposes ancillary thereto in rural area; or
 - (ii) who normally earns his livelihood by practising a craft either by his own labour or by the labour of the member of his family in rural area. [Section 2(j)]
- 11. "Scheduled Caste" means a member of any caste, race or tribe or part of or group within a caste, race or tribe specified as Scheduled Caste with respect to the State of Madhya Pradesh under Article 341 of the Constitution of India. [Section 2(k)]
- 12. "Scheduled Tribe" means a member of any tribe, tribal community or part of or group within a tribe or tribal community specified as such with respect to the State of Madhya Pradesh under Article 342 of the Constitution of India. [Section 2(l)]

Committee (Section 7). The fourth committee *i.e.* Gram Legal Aid and Legal Advice Committee has been provided for by M.P. Act 51 of 1976 Madhya Pradesh Legal Aid and Legal Advice (Amendment) Act, 1976.

*M.P. Legal Aid and Legal Advice Board*¹³

The Board is a body corporate having perpetual succession and a common seal, with power to acquire, hold and dispose of property both movable and immovable, and to contract. It may by the said name sue and be sued. The Chief Justice of the High Court of M.P. is the Chief Patron of the Board and the minister having the charge of law, M.P., the chairman thereof.

There are two categories of members:¹⁴ (A) *ex-officio* members, (B) members nominated by the State Government. There are 8 *ex-officio* members and 27 nominated members. In addition, member secretary is to be nominated by the State Government.

*District Legal Aid and Legal Advice Committee*¹⁵

This committee consists of three category of members; namely, (A) *ex-officio* members (7), (B) members nominated by the State Government (1), (C) members nominated by the Collector (12).

*Tehsil Legal Aid and Legal Advice Committee*¹⁶

This committee consists of two categories of members (A) *ex-officio* members (4), (B) members nominated by the Collector (6).

*Gram Legal Aid and Legal Advice Committee*¹⁷

Gram Panchayat may be declared as Gram Legal Aid and Legal Advice Committee. It shall consist of such members as Tehsildar may specify.

13. Section 3 of M.P. Act 26 of 1976.

14. Section 4, *ibid.*

15. Section 5.

16. Section 6.

17. Section 7-A.

*Legal Advice*¹⁸

Legal advice is not the same as legal aid. Legal advice has been defined in Section 2(f) so as to include advice given and assistance rendered in accordance with the provisions of this Act (Legal Aid Act) for avoidance of vexatious and unnecessary litigation in any form.

Section 33 deals¹⁹, with the persons eligible for legal aid or legal advice. No distinction exists with regard to persons eligible for legal aid and legal advice. The first category of those eligible includes a landless agricultural labourer²⁰ and a rural artisan²¹, and second category includes a person who belongs to a family²², (i) whose income is Rs. 200 or less per month, (ii) or holds less than one hectare irrigated land or two hectares unirrigated land and his sole source of income is agriculture.

Provided, however, it shall be competent for the Madhya Pradesh Legal Aid and Legal Advice Board to permit legal aid or legal advice irrespective of means test (i) in matters of great public importance, or (ii) in a test case, or (iii) in such special cases which the Board considers to be deserving of legal aid or legal advice.²³

Legal advice cannot be rendered in seven cases, of defamation, malicious prosecution, breach of promise of marriage, inducement of one spouse to live or remain apart from the other, election matters, economic offences and offences against social laws like prevention of dowry and restraining of child marriage.²⁴

Except these, legal advice may be given in all matters in which a *question of law is involved*. The legal advice is aimed at (i) amicable settlement of disputes by securing co-operation of parties to a dispute²⁵, and (ii) rendering assistance in the matters provided in clause (i) of Section 23.

18. Section 34.

19. *Ibid.*

20. Section 33(a).

21. Section 33(b)(i).

22. Section 33(b)(ii).

23. Section 23.

24. Section 37.

25. Section 34.

Legal Assistance

Legal assistance may be given by lawyers or other competent law experts in the following forms.

Consultation

Consultation services will have to be arranged by legal advice committees of District, Tehsil or Gram level, so that effective guidance may be available not only to persons of meagre means but also to those who fall beyond statutory enumeration of those eligible to get legal aid. This is needed for obvious reasons because it is these people who might file suits against aided persons. The M.P. legal aid law needs to be amended on this point. The services of retired Professors of Law and men of judiciary may usefully be utilized for this purpose in addition to panel of lawyers.

Negotiation

Legal aid officers in the State of M.P. are doing very well on this point. The offices of these authorities are located mostly in collectorate compounds and these leave an impression in the minds of even mischief mongers that it would not be in their interest to defy the advice of legal aid officer. On the application of the aggrieved party, the opposite party is summoned by the legal aid officer and the process is served in the same way as is done in cases of court summons. The party ordinarily appears and an attempt to dispose of the case by negotiation starts. About 30% to 40% cases are settled at this level itself.

In this way legal advice centres help to fulfil the objectives of preventive legal service programmes and succeed in persuading the parties not to take the dispute to a court of law.

Drafting of Documents

Legal assistance also includes drafting of proper documents to secure rights of poor persons and save them from difficulties and expensive and time-consuming litigation. This can very well be done by associating competent draftsmen with legal aid and legal advice centres.

Legal Aid

Legal aid means the legal aid specified in Section 36. Legal aid may be given in a legal proceeding²⁶, if the following conditions²⁷ are satisfied, that is to say, (i) there is *prima facie* case and (ii) the claim is reasonable and for want of legal aid claimant is likely to suffer in securing his legal right. If there is any legal advice, the legal aid will be given only if the claimant has acted in accordance with the legal advice. Bar of legal advice applies to legal aid also and only those persons are eligible for legal aid who are eligible for legal advice.

*Modes of Legal Aid*²⁸

The legal aid may be given under this Act in all or any of the following modes, namely ;

- (i) payment of court fees, process fee, expenses of witnesses and all other charges payable or incurred in connection with legal proceeding ;
- (ii) representation by a legal practitioner in a legal proceeding ;
- (iii) supply of certified copies of judgments and orders in a legal proceeding ;
- (iv) preparation of appeal, paper books including printing and translation of documents in a legal proceeding ;
- (v) any other mode as may be prescribed.

Social Policy of the Legal Aid Programme

What is intended to be achieved when one talks about legal aid scheme? If legal advice institutions are regarded as mere sieves which dispose of the cases which require only a few words of explanation and pass the remainder to another institution for litigation, the charitable systems which already exist in several countries can be made adequate by reorganisation and expenditure of little money. But experience shows that more than this needs to be attempted. The office to which person in legal difficulty

26. Section 35.

27. *Ibid.*

28. Section 36.

comes for advice is the most suitable agency for bringing about reconciliation between the parties. To achieve this laudable objective it would be necessary to ensure that legal advice is given by competent persons and at the right moment. It goes without saying that by and large the common man is of non-litigious nature. He looks upon law as a wasteful exercise and courts beyond his reach. In his opinion, the judgments are based on evidence which are made complicated through technical rules, skill and manipulation of lawyers. The court proceeding is nothing more than a colourful drama beyond his comprehension. Ill advised, he goes to the lawyer and once to the lawyer, he comes back with no time to repent for.

Preventive Legal Aid Programme—The Need of the Hour

What is needed is not the aid to fight out the battle. This is another way of maintenance and champerty and should be extended only when a poor man is dragged before a law court.

Preventive legal aid programmes need to be encouraged. Preventive legal advice like preventive medicine requires that the people should be encouraged to seek legal advice not merely when the matters have precipitated but at a much earlier stage.

Role of Law Departments and Preventive Legal Advice Programmes

Some of the law departments of universities are running free law counselling centres but their proper utilisation depends upon requisite will and proper coordination. To me it seems that it is the duty of a law department to generate faith in the masses about law and its administration. The present structure of law is breaking under its own weight and no one should be under a notion that people go to courts because they have faith in it. It is the other way. They go to courts because they have no other place to go and the courts of law are still linked with the repository of power i.e. State. It is, therefore, necessary that the extra workload of the court is disposed of speedily not only by increasing the number of courts or appointing more judges but also by exploring the possibility of settling people's grievances through informal procedures or institutions which would obviate the need of taking the matter to a court. Preventive legal aid programmes can help much in this direction, and law schools can render considerable

help in achieving this objective. The State of M. P. has taken steps to open a law college at Shahdol with an exhaustive course on legal aid, and preparations are being made to start a legal aid research centre. This is a welcome move.

Non-formal Legal Education and Legal Aid Scheme

Education makes a man perfect as far as he is concerned; legal education makes him perfect for those with whom he is concerned. Irony of the situation is that Bar Council knows only of formal education in law. It does not recognise private or correspondence courses in law. In absence of any such recognition, non-formal legal education does not find place in university curricula and a sizeable portion of our population goes without legal literacy. It is common knowledge that attendance in law colleges is not enforced. Heads of law departments are continuously under pressure to certify that a particular student who was on the roll did complete minimum attendance requirement. If that is so what purpose is served by outlawing non-formal legal education. If preventive legal aid programme is to be implemented with any seriousness, legal knowledge will have to be shared with the common man. This would mean taking steps to bring knowledge of law within reach of common people who in India mean illiterate downtrodden people belonging mainly to socio-economically weaker sections of the society. Give legal aid and advice to them, but if you want them to receive it and be benefited, one will have to help them to rise, stand and move. It is practicable only when law schools manage to reach out to the poor inhabitants in their huts after breaking the myth that theirs is the Lord's profession.

Legal Literacy Extension Programmes

Preventive legal aid programme should include the work of creating awareness amongst downtrodden people of social welfare legislation which create rights and provide means to enforce them. For this purpose legal aid camps should be organised in remote villages. Law Department of Sagar University has already provided for setting up of such camps as part of practical training programme. Similar steps should be taken by law departments of universities elsewhere so that law students may realise their

social responsibilities well before they enter into the profession. Legal aid clinics should be set up in the law schools as early as possible.

Working of Legal Aid Institutions in M. P.

In M. P. all the bodies up to district level have been duly constituted and one to two legal aid officers have been appointed in each district headquarter. Out of a total of 275 tehsils, in as many as 206, Tehsil Legal Aid Committees have been formed. Separate buildings in collectorate compounds for legal aid offices have either been constructed or are in process of construction. Gram Legal Aid Committees have not been so far constituted though provision to that effect has been made in Legal Aid Act 51 of 1976. Legal aid officers are wholetime public servants in the scale of civil judges and they are given priority in selections of civil judges. This new cadre is a speciality of the State of Madhya Pradesh. Legal Aid Officers are public servants in the real sense of the term. They have not been provided with a peon or a clerk, but they perform all the jobs and they are succeeding in inculcating a sense of confidence in the masses about the sincerity of their mission. This assertion is supported by the statistical data contained in Annexure III regarding the quantum of legal aid, advice and assistance given by the legal aid institutions.

Permanent Defence Lawyers

Legal aid scheme is a movement in the State of M. P. The State has appointed permanent defence lawyers to take care of the interests of Scheduled Tribes living in *Adivasi* areas. This cadre is equivalent to those of Government pleaders.

Legal Aid and Courts of Law

The State of M. P. has requested its judicial officers to see at their level that no one suffers injustice for want of legal aid, advice or assistance. They are very cautiously guarding the interests of weaker sections within the limits of the law. This goes beyond what is given in Section 304 of the Criminal Procedure Code.

In all in the three benches of the High Court of M. P., and even in the Supreme Court, Legal Aid Committees are working to ensure that poverty or ignorance may not seal the fate of the downtrodden. As the Annexure will show, in 281 cases at the High Court level and 488 cases at the level of the Supreme Court legal aid has been provided by the State of M. P. As regards district courts the data up to August 31, 1983 has been compiled. As per the details given in the Annexure, it is worth satisfaction to note that legal aid has been given to 6042 and 5534 persons belonging to Scheduled Castes and Scheduled Tribes respectively. In addition to this legal aid has been given to eligible people belonging to other castes. Legal advice has been given in 19,609 cases of Scheduled Castes, 15,638 cases of Scheduled Tribes and 23,921 cases of other castes. Legal assistance has been provided to 30,653 persons belonging to Scheduled Castes, 26,107 people of Scheduled Tribes and 36,780 people of other castes. In all 94,319 cases have been handled by legal aid officers during 1982-83.

Legal Aid Service—An Experience

Legal aid movement has succeeded in drawing the attention of the people in general and those directly involved in particular to the problems of the poor. During talks with a senior legal aid officer, an incident was narrated which is quoted here to prove that legal aid service, if taken a bit more seriously, will help to abolish poverty in a large measure. The story is of a Chhindwara Adivasi woman. Her husband died leaving a brother and widow with two small children. They had eleven acres of land. The widow was thrown out of the ancestral house and was given no share in land. She was anyhow advised to go to the legal aid office. The legal aid officer summoned the brother of the deceased and persuaded him to give the widow her share or to face legal action. He agreed to give the share. Five people of the village divided the land as well as household articles including grain and utensils. The patwari was on the scene. Mutation was done immediately and details sent for record to legal aid office. All this happened within a month and without any cost to the parties. Such a decision acceptable to both the parties obviated the need of having the matter agitated in the court.

Despite this success, the whole system is on trial. It would be useful to make the following observations.

(i) *As regards Section 304 of Criminal Procedure Code*:—This section enables the session court to arrange a counsel in undefended cases. This is incomplete. It ignores many of those cases that are disposed of finally by magistrate's courts. It is recommended that counsel should be provided in all cases if the court has a reasonable apprehension that causes of a person belonging to the weaker section of the society is not being properly argued.

(ii) *As regards eligibility*:—The ceiling of income of Rs. 200 per month or one or two hectares of land is unrealistic in changed situations. This needs to be changed and the eligibility should be fixed at Rs. 500 per month or three hectares of irrigated land or five hectares of unirrigated land.

(iii) *As regards lawyers on the legal aid panel*:—Appointments of legal aid lawyers is governed by those considerations that apply to the appointments of government pleaders. If so, why not give the responsibility to the government pleaders for handling such cases. The payment is quite meagre as compared to fee from private clients, why should it be like this? If the government means effective legal aid, it should permit the aided person to select an advocate of his choice and whatever he pays on this account should be reimbursed to him out of legal aid fund.

What happens at present is that senior lawyers with meaningful practice do not agree to be on the panel of legal aid lawyers. The law needs to be pressed into service to compel the unwilling senior lawyer to do minimum of 5 to 10 legal aid cases every week.

In brief, the policy underlying legal aid advice and assistance is the constitutional commitment of providing justice—political, social and economic, to all sections of people. Free legal aid should be given not only to Scheduled Castes and Scheduled Tribes but also to many of those who are below the poverty line and as a matter of right and not charity. The State of M. P. has given a lead by making a legislation to this effect. It would be in fitness of things if other States in India also fall in line.

Select Bibliography

1. Madhya Pradesh Legal Aid and Legal Advice Act 26 of 1976 and Act 51 of 1976.
2. M.P. Vidhan Sabha Proceedings, Vol. 13, No. 30 (1976).
3. Madhya Pradesh Scheduled Tribes (Legal Aid) Rules, 1960.
4. Report of the Study Team on Nyaya Panchayat appointed by Ministry of Law, Government of India (1962).
5. M.P. Legal Aid and Legal Advice Board Regulations (Rules), 1976.
6. Report of the Legal Aid Committee (Government of Gujarat), 1971.
7. Report of the Preparatory Committee for Legal Aid Scheme, Government of M.P. (1975).

ANNEXURE I

**Administrative Infrastructure of the Statutory Legal Scheme
State Aid and Advice**

Chief Patron	—	Chief Justice of M.P. High Court [Section 4(3)]
President	—	Minister of Law, Government of M.P. [Section 4(3)]
Member Secretary	—	To be appointed by State Government [Section 4(2)]

Members

Ex-officio				Nominated by State Government			
1	2	3	4	5	6	7	8
Minister having charge of Law Govt. of M.P. Section 4(i)]	Advocate- General M.P. [Sec- tion 4(i) (ii)]	Law Sec- retary Govt. of M.P. [Sec- tion 4(i)(iii)]	Finance Secretary Govt. of M.P. [Sec- tion 4(i)(iv)]	Regis- trar High Court M.P. [Section (i)(v)]	Chairman State Bar Council [Section 4(i)(vi)]	Director Harijan & Tribal Welfare [Section 4(i)(vii)]	Labour Commis- sioner [Sec- tion 4(i) (viii)]

Others

Two M.Ps. from State [Section 4(i)(ix)]—1

Three M.L.As. [Section 4(i)(x)]—2

Three representatives from High Court Three Benches [Section 4(i)(xi)]—3

Three Prominent Social Workers [Section 4(i)(xii)]—4

Four representatives of Voluntary Legal Aid Organisations [Section 4(i)(xiii)]—5

One eminent legal aid Expert [Section 4(i)(xiv)]—6

Two members from District Legal Aid Committees [Section 4(i)(xv)]—7

One woman representing social organisations [Section 4(i)(xvi)]—8

One representative each from S.C. and S.T. [Section 4(i)(xvii)]—9

One representative each of organised and unorganised labour [Section 4(i)(xviii)]—10

One professor from faculty of Law from a university [Section 4(i)(xix)]—11

One law student from universities in State [Section 4(i)(xx)]—12

Two nominees of State Government from those not covered by above [Section 4(i)(xxi)]—13

ANNEXURE II

District Legal Aid Committee

[Section 6]

(A statutory body at District level)

Chairman-Collector [Section 6(i)]

Member-Secretary—To be appointed with approval of State Legal Aid and Advice Board

Members						
Ex-officio	Nominated by State Government			Nominated by Collector		
1	2	3	4	5	6	7
Collector [Section 6(i), (ii)]	Chief Judicial Magistrate [Section 6(i)(ii)]	President District Bar Association [Section 6(i)(iii)]	Govern- ment Pleader Section 6(i)(iv)]	District Panchayat and Social Welfare Officer [Section 6(i)(v)]	Asstt. Labour Commis- sioner [Section 6(i)(vi)]	Dy. Director Tribal and Harijan Welfare [Section 6(i)(vii)]

Others

Two members of District Bar Association [Section 6(i)(ix)]

Two members of the local authorities in the District [Section 6(i)(x)]

One member of the teaching staff of the law college in the District [Section (i)(xi)]

One representative of the students in the District [Section 6(i)(xii)]

One woman preferably a lawyer practising in District Court [Section 6(i)(xiii)]

One representative of Labour [Section 6(i)(xiv)]

One member of Scheduled Caste [Section 6(i)(xv)]

One member of Scheduled Tribe [Section 6(i)(xvi)]

Two other persons not covered by any of the aforesaid clauses [Section (i)(xvii)]

ANNEXURE III

Office of the M.P. Legal Aid & Legal Advice Board, Bhopal
District-wise Statement of Progress, Year 1982-83

S. No. District		Legal Aid S.C. S.T.		Legal Advice G.C. S.C. S.T.		Legal Assistance G.C. S.C. S.T.			Total G.C.		
1	2	3	4	5	6	7	8	9	10	11	12
1.	Khandwa	52	259	197	1282	760	1496	32	20	11	4109
2.	Chhindwara	5	24	13	17	21	64	16	12	11	183
3.	Jabalpur	26	11	115	85	48	352	6	7	105	755
4.	Damoh	45	28	25	252	218	226	24	21	23	862
5.	Durg	55	15	44	5	—	12	—	—	—	131
6.	Narsinghpur	47	12	75	202	110	282	52	11	92	883
7.	Jagdalpur	78	482	117	237	841	285	219	702	178	3139
8.	Balaghat	28	20	19	34	39	71	14	15	20	260
9.	Bilaspur	72	51	94	35	26	35	5	4	7	329
10.	Betul	41	74	117	295	218	193	—	—	—	938
11.	Mandla	8	73	43	45	69	54	2	4	4	302
12.	Rajnandgaon	73	60	66	68	55	87	270	240	281	1200
13.	Raigarh	21	25	20	20	14	25	—	2	—	137
14.	Ambikapur	11	41	19	62	190	104	6	16	9	458
15.	Sagar	46	20	140	548	218	1086	82	34	132	2306
16.	Hoshangabad	6	1	7	2	—	4	—	—	—	20
17.	Chhatarpur	41	79	122	46	2	50	4	6	6	356
18.	Tikamgarh	16	9	52	52	21	135	4	1	12	302
19.	Datia	22	—	9	137	3	96	11	1	19	298
20.	Panna	53	14	38	75	19	54	—	—	—	253
21.	Rewa	35	20	75	44	50	156	—	—	—	382
22.	Satna	153	181	240	79	89	114	—	—	—	856
23.	Shahdol	17	172	70	15	25	50	3	27	2	386
24.	Sidhi	30	23	34	—	—	—	—	—	—	87
25.	Raipur	153	44	140	75	15	94	—	—	—	521
26.	Seoni	15	17	26	9	21	29	—	—	—	117
27.	Indore	31	12	40	329	719	420	129	30	36	1749
28.	Ujjain	139	10	169	1173	171	1091	64	31	51	2899
29.	Khargone	20	50	42	94	92	134	20	13	15	480
30.	Gwalior	157	9	190	77	4	66	—	—	1	504

1	2	3	4	5	6	7	8	9	10	11	12
31.	Guna	41	11	31	133	63	84	31	26	51	471
32.	Jhabua	5	108	16	104	990	75	—	58	—	1356
33.	Dewas	—	—	—	—	—	—	—	—	—	—
34.	Dhar	30	74	36	109	197	150	—	—	—	596
35.	Bhind	62	1	63	180	27	221	—	—	—	554
36.	Mandsaur	46	12	81	75	8	44	70	16	47	399
37.	Morena	243	51	232	184	31	262	85	16	152	1246
38.	Ratlam	31	61	51	74	149	150	—	—	—	516
39.	Rajgarh	57	27	83	505	53	253	120	29	53	1180
40.	Raisen	223	32	36	52	29	63	—	—	—	253
41.	Vidisha	228	26	153	711	187	599	349	118	482	2853
42.	Shajapur	57	9	31	46	6	9	—	—	—	158
43.	Shivpuri	80	43	40	185	102	137	3	2	1	593
44.	Schore	56	38	37	18	—	6	18	4	5	182
45.	Bhopal	100	6	99	259	21	183	43	6	34	751
<hr/>											
Sub-Committee											
	Jabalpur	8	6	69	4	—	14	—	—	—	101
	Indore	98	109	113	—	—	—	—	—	—	320
	Gwalior	14	2	36	22	3	44	12	1	16	150
	Total	2675	2452	3565	8055	5924	9162	1694	1473	1863	36663

ANNEXURE IV

Office of the M.P. Legal Aid & Legal Advice Board, Bhopal
 District-wise Statement of Progress, Year 1-4-1983
 to 31-8-1983

S. No.	District	Legal Aid		Legal Advice		Legal Assistance			Total		
		S.C.	S.T.	G.C.	S.C.	S.T.	G.C.	S.C.	S.T.	G.C.	
1	2	3	4	5	6	7	8	9	10	11	12
1.	Khandwa	33	59	22	1030	712	502	—	—	—	2358
2.	Chhindwara	4	3	22	8	16	33	2	8	20	116
3.	Jabalpur	2	1	21	17	16	99	—	—	41	197
4.	Damoh	26	13	9	89	74	83	—	2	5	301
5.	Durg	6	2	17	—	—	—	—	—	—	25
6.	Narsinghpur	10	4	25	86	26	71	21	5	15	263
7.	Jagdalpur	4	10	5	9	25	22	4	9	14	102
8.	Balaghat	7	6	12	34	35	86	—	1	—	181
9.	Bilaspur	22	10	7	42	37	51	9	5	7	190
10.	Betul	45	69	61	55	91	61	—	—	—	382
11.	Mandla	35	24	42	143	97	94	17	49	—	501
12.	Rajnandgaon	18	24	16	38	55	16	146	83	78	474
13.	Raigarh	7	9	16	14	22	19	1	—	—	88
14.	Ambikapur	1	7	7	—	2	1	—	—	—	18
15.	Sagar	26	2	34	83	17	32	26	17	43	282
16.	Raipur	28	3	18	21	3	17	—	—	—	90
17.	Seoni	5	4	4	6	8	18	1	—	—	46
18.	Hoshangabad	17	4	5	—	—	—	—	—	—	26
19.	Chhatarpur	10	1	23	9	—	11	1	—	—	55
20.	Tikamgarh	17	1	16	24	1	102	1	—	—	162
21.	Datia	6	—	30	8	—	17	2	—	2	65
22.	Panna	13	16	16	9	11	11	—	—	—	76
23.	Rewa	12	—	43	6	7	11	—	—	—	79
24.	Satna	40	32	38	249	19	70	—	—	—	448
25.	Sahdol	5	30	24	9	18	10	4	4	1	105
26.	Sidhi	5	7	28	10	—	—	—	—	—	58
27.	Indore	6	6	12	365	92	120	4	—	8	613
28.	Khargone	2	28	12	17	25	32	5	14	13	148

1	2	3	4	5	6	7	8	9	10	11	12
29.	Ujjain	40	—	40	223	2	82	3	—	5	395
30.	Gwalior	23	4	80	22	15	27	—	—	—	173
31.	Guna	17	1	17	30	14	13	1	1	1	95
32.	Dewas	—	—	—	—	—	—	—	—	—	—
33.	Jhabua	3	13	19	4	227	20	1	7	7	361
34.	Dhar	5	12	15	44	63	—	1	—	—	140
35.	Bhind	9	—	12	158	22	192	1	—	2	396
36.	Mandsaur	5	3	20	8	1	9	10	2	2	60
37.	Morena	2	—	7	53	17	77	11	4	11	182
38.	Ratlam	5	30	21	24	78	40	—	—	—	208
39.	Raigarh	31	7	30	102	38	87	62	10	32	399
40.	Raisen	2	—	4	2	6	3	—	—	1	18
41.	Bidisha	133	15	96	86	50	84	4	—	7	457
42.	Shajapur	2	1	—	18	—	6	—	—	—	27
43.	Shivpuri	3	10	13	55	33	26	—	—	—	140
44.	Sehore	15	14	4	9	2	11	37	1	20	113
45.	Bhopal	19	—	25	78	3	40	25	—	30	220
Sub-Committee											
	Jabalpur	8	12	7	2	—	3	—	—	—	24
	Indore	25	36	23	—	—	—	—	—	—	84
	Gwalior	2	—	23	4	1	13	—	—	—	43
	Total	753	594	1041	3285	1981	2339	400	222	369	10984

EQUITY AND SALES TAXES IN INDIA WITH SPECIAL REFERENCE TO J & K STATE

R. K. KOTRU

In a democratic welfare State equity in a tax system probably occupies most prominent place. In fact all the authorities on taxation have emphasized the criterion of justice. Equity comes first on the list of tax maxims enumerated by Adam Smith.¹

There is general agreement that taxes should be equitable, but there is considerably less agreement concerning on what would be equitable. Since everyone commends equity, one should not expect its meaning to be very precise. It is more political rather than a strict economic concept.² It is therefore no surprise that a large number of economists have regarded equity in a tax system as more properly the domain of statesmen, politicians and also of social philosophers. The concept of equity is not fixed and rigid either in the horizons of space or time. It depends upon the social and political ideas prevalent and accepted in a community. What might have been deemed to be just and fair in the past may be regarded as inequitable today. Historically, the concept of equity has been used to justify regressive proportional and progressive taxations. However, there is a widespread agreement among both the economists and social philosophers that taxes or at least the composite tax system as a whole in order to be equitable should be progressive. But it has been difficult to fix degree of progression taxes should have.

The view of a tax as a price paid for public services characterizes all benefit doctrines and distinguishes them sharply from

* M.A. (Criminology and Forensic Science, Gold Medalist); Ph. D.; Diploma in Russian (Hons.); M.I.S.C. Research, Analysis and Tax Planning Wing, Finance Department, Jammu and Kashmir Government.

1. *An Inquiry into the Nature and Causes of the Wealth of Nations*, Modern Library Edition, (Random House Inc., New York), p. 777.
2. Gerhard Coln: *Essays in Public Finance and Fiscal Policy*, (Oxford University Press, New York), p. 57.

the principle of individual ability to pay. The latter emphasizes the contributory nature of the tax payment and implies that the benefits from most government expenditures, being of general rather than specific nature, cannot be traced to individual recipients. In practice, equity is usually related to the ability to pay. The benefit doctrine if applied at all is restricted to few specific taxes such as postal charges, etc. Moreover, it is widely accepted now that the principle of ability to pay leads to progressive taxation.

Two main aspects of equity problem are usually delineated :

- (1) Similar treatment of people in similar circumstances.
- (2) Dis-similar treatment of people in dissimilar circumstances.

The circumstances considered may refer to income, expenditure or wealth or to any of the various meanings which each of these concepts can be given. Probably the most appropriate criterion would be a combination of income and wealth but it is difficult to reach agreement on how the two should be weighed in relation to each other. Thus in practice equity is almost always exclusively discussed in terms of income alone. In discussions on tax equity, then, the general practice is to adopt income as the index of ability to pay and to favour a progressive tax system. However, there is little agreement of just how much progressive a tax system should be. Dan Throop Smith has pointed out that "the concept of ability to pay is almost universally taken to justify some degree of progression in effective tax burden. But the pattern of progression in spite of numerous attempts at rationalization, seems to rest on personal value judgements for each individual's opinion and on political compromise in the world of affairs".³ Thus it has not been possible to postulate any sort of optimum degree of progressivity. Some economists have suggested that equity should be thought of in the tax system as a whole and not of any one tax alone. It is desirable to look at the equity of tax system and public expenditure taken together and not merely the equity of the tax system. The lack of equity in the tax system may be

3. "Rates, Allowances, and Averaging" *Report of Proceedings of the 19th Tax Conference* (Canadian Tax Foundation, Toronto, Canada), p. 25.

offset by equity in public expenditure. But it is not easy to measure the incidence of public expenditure in view of conceptual and practical problems. Thus in practice equity is usually discussed in terms of specific taxes or in terms of tax system as a whole taking element of progression as an important factor.

So far as the direct taxes are concerned it is not difficult to introduce optimal degree of progression but to introduce progression in commodity taxation is indeed a very difficult job. This paper is confined to equity in sales tax system and therefore other indirect taxes shall not be discussed.

The most frequent criticism of sales taxation is that it is regressive. In India it is widely believed that sales taxation by its very nature must be regressive. S.N. Agrawalla in his book *Indian Public Finance* writes: "Sales tax is not a progressive tax as there is no possibility of introducing (an) element of progression in this tax. It is an indirect tax and an indirect tax cannot be progressive. It is a tax on the sale of commodities and whosoever purchases the commodity has to pay the tax at the same rate irrespective of his income or ability to pay. Therefore the tax is not progressive."⁴ Similarly, Prof. D.T. Lakdawala emphasizes that "income taxation can be easily made progressive while commodity taxation even with a heavy rate of taxation on luxuries cannot be made progressive".⁵ The notion that indirect taxes are regressive in character is also commonly held in the developed countries as well. Richard Goode has contended that there is statistical evidence to support this evaluation for some of the principal indirect taxes in certain richer countries. A number of studies of sales tax conducted empirically in the USA have shown that sales tax without exemption is middle regressive. However, there is no statistical support for the text books' charges that such taxes are highly regressive. What most of these statistical studies have revealed is that the sales tax with food exempt is slightly regressive in the very low income groups and again in the higher income groups. However, for most of the range, the

4. (Vora and Co. Publishers Pvt. Ltd., Bombay) p. 238.

5. "Expansion of Tax Revenues" in papers relating to the formulation of the Second Five Year Plan (Government of India, Planning Commission), p. 502.

retail sales tax is found to be roughly proportionate with food exempt.

Sir Arthur Lewis is one of the few eminent economists who has correctly regarded the idea that indirect taxes are necessarily less progressive than direct taxes as fallacious.⁶ The poor, the rich and the middle classes consume different goods in different proportions. Hence if you put low indirect taxes upon what the poor consume and high indirect taxes upon what the rich consume, indirect taxes can be made just as progressive as direct taxes. This principle appears to have been followed by most of the States of the Union of India while designing their sales tax systems. The attempts to make sales tax systems in the States of India progressive have not remained confined to the exemption of necessities but have also resulted in a wide range of tax rates. The goods which are considered luxuries are taxed at much higher rates than the items which are supposed to be of common use. Each of these parameters merit a brief discussion.

Exemption of "necessities": More than half of exemptions in the States sales taxes in the country can probably be placed in this category. A large number of these exemptions are for food items. The Indian States do not follow the practice prevalent in most of the rest of the world of exempting all foods in general and then excluding certain items or delimiting what is and what is not deemed to be a food. Instead all the States of the Union exempt specific items of food and tax what is not exempted. As elsewhere, the primary purpose of exemption for food items is to relieve the tax burden on the lower income groups. The sales tax system without exemption on food is considered highly regressive and therefore inequitable. The sales tax system in the country would probably remain as much progressive even if food is taxed since most food items would escape taxation in the rural areas because what could be taxed would only be the farmer's surplus. However, the food exemption definitely increases the progressivity of sales tax system in India. Moreover, food exemption is all the more important in

6. *The Theory of Economic Growth*, (Richard D. Irain Inc., Home Wood, Illinois), p. 403.

the country from the point of view of equity between the rural and urban sectors. In the Indian context a sales tax on food would almost entirely fall on the urban population.

There is a considerable diversity in the number of food items that are exempted in various States: Assam, Delhi, Gujarat, Maharashtra and West Bengal have given the largest number of food exemptions. On the other hand Bihar, Kerala, Tamil Nadu, U.P. etc. exempt relatively lesser number of food items. It is indeed surprising that there is no food item which is exempt in all the States of the Union. However, the following seven items are exempt in 15 of the States :

- | | |
|---------------------|-------------------|
| 1. Fresh meat | 5. Fresh Fruits |
| 2. Eggs | 6. Fresh Milk and |
| 3. Fresh Fish | 7. Salt |
| 4. Fresh Vegetables | |

The State of J & K has perhaps the largest number of tax exemption on food items. There is hardly a food item which immediately comes to mind and which is not exempted. However, certain items like meat, vegetables when sold in sealed containers are taxed under the scheme of J&K General Sales Tax Act. But a recent survey has shown that hardly any tax of statistical significance accrues to the State on the sale of such items. Because of the development in transportation, all weather roads etc. fresh meat and vegetables are available in all the parts of the State round the year and hardly any contingency arises which may force people to go for tinned meat or vegetables. Taxing of these items is thus only academic. The taxing of these items when sold in sealed containers is probably an attempt to increase the progressivity of the State sales tax system. It is a widely held belief that such items when sold in sealed containers are consumed by the affluent sections of the society.

In the light of very low standard of living of most of the people of the country it is rather surprising that certain food items in a large number of States are taxed. However, the extent of this taxation is not as great as one might surmise by looking at the exemptions. While many important food items are taxed under

some of the Sales tax system they are taxed at very low concessional rates.

An extensive food exemption has a number of justifications. It increases the progressivity of sales tax system and it simultaneously reduces or eliminates most of its horizontal inequities. The food exemption virtually eliminates the discrimination against large families and it largely eliminates the inequity between the rural and urban sectors under sales tax system.

Sales Tax Rates: There is a considerable rate differentiation in almost all of the sales tax systems of the country. Punjab is probably the only State having short list of 5 rates. The State of J & K has also a very large rate differentiation in the sales tax system. Depending upon the commodity, sales tax in the State of J & K is levied at 1,2,3,4,5,6,7,8,10,12,18,25 and 30 per cent. All types of yarns and edible oils are taxed at the rate of 1% while Indian made foreign liquor and beer are taxed at the rate of 30%. The electronic goods including radios and T.Vs. are taxed at the rate of 12% while the sale of automobiles is taxed at the rate of 10%.

Extensive differentiation of rates appears to be an attempt to rank the commodities according to the extent of their luxurious nature. The more luxurious (the less of a necessity) a commodity is felt to be, a higher rate of tax is deemed appropriate. In the developed countries, there has been a strong tendency to reject the taxation of luxury goods at higher than normal rates primarily on the ground that there are no objective grounds for delineating luxury goods from non-luxury goods. However, there is little doubt that India has not yet reached the stage where delineation between luxury and non-luxury goods is superfluous. Thus it is difficult to question the justification for taxing luxuries at a higher rate. This delineation is important to progressivity and hence equity of the sales tax system. But what can be questioned is both desirability and feasibility of making such fine distinctions as are implicit in the extensive rate differentiation. The classification of commodities into luxury and non-luxury has also tended to be rather rigid. An item which was considered to be a luxury about 25 years ago continues to be so considered.

Items which immediately come to mind are radios and transistors, watches etc. There are hardly a few cases in the entire country where rate of tax has been lowered on rethinking regarding its utility.

The above discussion leads one to the inevitable conclusion that sales taxes in India, and more particularly, in the J & K State, are progressive to a degree. However, it is necessary to look beneath such statement to ascertain over what range sales taxes are progressive. While we lack satisfactory data on this question, it seems likely, keeping in view the expenditure pattern of different income groups, that sales taxes in most of the States are progressive at the lower end (of the income expenditure), regressive at the upper end and uncertain in between. In other words, they are regressive against the middle classes. The reason for this belief is the fact that lower income classes in most of the States of the Union who spend most of their income on food which is generally exempted or taxed at a very low concessional rate, escape sales taxation altogether. On the other hand, much of the luxury expenditure of the higher income classes (such as consumer services) are either un-taxed or not effectively taxed. Much of the revenue from sales taxation appears to emanate from what may be called middle class luxuries. That is more particularly true in the State of J & K. There is thus urgent need to tax services and give some concession to middle classes. Considerations of equity demand the immediate taxation of service. The failure to subject consumer services to sales taxation means that the individuals making relatively high expenditure for services are favoured compared to those concentrating their expenditure on tangible goods. Many services tend to be luxuries and expenditure on such luxuries is stated to be directly proportional to the affluence of an individual. It is desirable, therefore, to start giving some serious attention to the taxation of services.

There was a constitutional restraint to the effect that the States could not tax the services under sales tax law. But this restraint has been removed by the 46th Constitutional Amendment Bill. Though the bill was passed by the Parliament more than a year ago but till date no State of the Union has imposed sales tax on consumer services. This restraint was, however,

never applicable to the State of J & K because under Section 5 of the State Constitution, the State of J & K enjoys residuary powers of taxation. But the fact remains that hardly any advantage has been taken to tax consumer services under the State sales tax law.

Thus while it is possible to make sales taxes a little more progressive, it is much more difficult to do away with what might be called their capriciousness. Unlike income taxes sales taxes are unable to adjust the burden of taxation in the light of a number of dependent and other personal considerations. Sales taxes tend to bear more heavily on large families than on small families within every income group. Moreover, the families of the same size and same income are likely to bear considerably less of the sales tax burden if they are rural rather than urban. It is thus horizontal inequity of sales tax system which is perhaps more serious. In fact the greatest weakness of sales taxes appear to be their inequity between the rural and urban sectors or between occupational groups and also in view of almost general exemption of consumer services, inequity does exist between middle classes and the rich. Can we alter the situation?

In conclusion it may be mentioned that all the sales tax systems and particularly the J & K sales tax system have taken proper care so far as economically poor sections of the society are concerned.

SECTION 4
PROTECTION OF WOMEN

WOMEN IN THE WORKFORCE, THEIR LEGAL RIGHTS AND PROBLEMS: TOWARDS A PERSPECTIVE

T. K. OOMMEN

In focussing attention on women in workforce we must keep in mind two important considerations. First, we are concentrating our attention on *women as producers of exchange values* and second, the *critical resource* at the disposal of women would vary depending upon their socio-economic *levels and locations* in society and consequently their legal rights and problems would differ depending upon the variations in these levels and locations. This note would briefly discuss each of these issues so as to provide a perspective to the seminar.

In the pre-capitalist/pre-industrial societies men and women were mainly producers of use-values. With the emergence of industrial urbanism, commodity production as an economic activity crystallized. This brought about the distinction between producers of use-values (usually done at home by women) and producers of exchange-values (usually undertaken away from home by men). This in turn sharpened the distinction between "bread-winners" and the "bread-receivers". For a variety of cultural and historical reasons men came to be legitimised as bread-winners and women were relegated to the position of bread-receivers, although of course they continued to be producers of use-values. Consequently, women experienced considerable erosion of status and they come to be viewed as *economically dependent* on men notwithstanding the fact that but for women producing use-values at home, men could not have been producers of exchange-values. Partly due to the market forces and partly due to the conscientisation that has been going on, women came to realise that it is necessary to enter into the employment market

* Professor and Head, Centre for Study of Social Systems, Jawaharlal Nehru University, New Delhi.

as producers of exchange-values if they want to shake off the shackles of their dependency on men and recapture their economic independence. The continuing large scale entry of women into the workforce can at least partly be viewed as an expression of this ongoing historical and of course historic struggle. However, as things stand today, women in workforce are constrained to perform two roles simultaneously, the domestic role wherein they are producers of use-values and the role in workforce, wherein they are producers of exchange-values. This situation is the legacy of age-old division of labour between the sexes. Notwithstanding much talk about the blurring of the sexual division of labour, as far as the domestic role is concerned the women have to shoulder the entire burden. Therefore, any meaningful discussion on law as an instrument of change in a policy perspective, should focus attention not only on the inadequate implementation of the existing laws (if indeed they do) but also on the *structural vacuum* in this context, that is, the very *absence of law* which can meaningfully cope with the stresses and strains faced by the women in workforce, precisely because they are simultaneously involved in two lead roles.

The critical resources needed for production, broadly viewed, are capital and labour. Here we are concerned with women in workforce and yet it is necessary to underline that the *situations of work* can be differentiated in terms of the use/application of the abovementioned critical resources. These are: (i) situations in which those who own capital and apply it for production but do not work it (employers); (ii) situation in which those who own capital also work it (self-employed); (iii) situations in which the workers simply sell their expertise/skill/labour power for salary/wage (employees). It is necessary to appreciate the distinction between the self-employed (e.g., the women who own and manage small/cottage industrial enterprises, the private practitioners of prestigious professions such as medicine, law, architecture *etc.*, the women farmers *et al*) and those who are mere employees. The assumption here is that the instrumentality of law may have different meanings as a facilitating/obstructing agent in these contexts. And, if the assumption is a correct one, it is necessary to explore the status of the existing set of laws *vis-a-vis* these contexts.

Most women in workforce are employees who sell their expertise/skill/labour power. Admittedly, a wide variety of women employees fall in this category discerned in terms of their levels of education, income, status, prestige and occupational diversities. Yet for purposes of analysis we can broadly divide them into three categories : (1) Those who are top administrators in public sector, the business executives in private sector, prestigious professionals (doctors, engineers, lawyers, university teachers) working as employees in organizations. The women in workforce in this category are as yet a small segment and constitute the upper echelons in the workforce. The recruits to this category are invariably from the urban middle and upper middle sections. They possess managerial/professional expertise. (2) Those who are in the lower administrative cadres (clerks, typists etc.), semi-professionals (nurses, schoolteachers etc.), those who are hired not only for their skills and intelligence but presumably for their looks too (air hostesses, receptionists, models etc.). This category is a substantial and rapidly growing one. In terms of their background they are lower middle/middle class, first generation educated/daughters of educated parents, urban dwellers/new migrants to urban settlements/those who are from rural areas etc. This category of women workers possess skills of some type or other and have undergone formal education. (3) Those who constitute the lowest economic stratum and sell their labour power for the wages they earn. They are predominantly illiterate/semi-literate, and located both in urban and rural settlements. The bulk of women in the workforce belong to this category and most of them are also in the unorganized sector. They are constituted by factory workers, the construction and casual labourers, agricultural labourers, the scavengers, the domestic maids and the like.

The above categorisation of women in workforce assumes that the disabilities and discriminations they face—legal and non-legal—are different. Therefore, it is necessary to discuss the legal rights and problems of each of these categories separately, so as to highlight (a) the need for appropriate new legal measures, (b) to identify the loopholes and lacuna in the existing legislations and (c) to locate the implementation lag. If the rationale of this categorisation is correct, it would imply that specific efforts

for discussing the legal rights and problems of each of these categories should be made. Additionally, special attention to the specific problems faced by the women in workforce drawn from Scheduled Castes, Scheduled Tribes, certain religious minorities (*e. g.* Muslims) etc., should be given. Similarly, the peculiar problems faced by rural women in workforce also need attention.

Logically it follows that the following issues in regard to the following categories of women in workforce will have to be raised and discussed.

The Issues

1. Is there a set of laws which meaningfully deals with the stresses and strains faced by women in workforce, given the fact that they are constrained to undertake simultaneously two sets of roles—as producers of use-values in the domestic context and as producers of exchange-values in the employment market? If the laws are non-existent, is there a case for initiating their formulation? And, if the need exists, how to go about it and what should be the areas of immediate and long term attention?

2. Do the existing laws discriminate in any way against those women who aspire to enter or those who are already in the workforce either as self-employed persons or as employees? Even if discrimination is absent at the level of the legal normative system, do the conventions in practice actually obstruct women's entry/continuation in the workforce? Finally, is there a case for introducing legislations which should facilitate women's entry into the workforce either as self-employed persons or as employees?

3. Are the existing laws comprehensive enough to protect the interests of women in workforce discerned in terms of their different levels and locations (as identified above). If the answer is not in the affirmative, what set of laws need to be formulated and for which categories? What are the loopholes in the existing laws and how do they manifest in the form of avoidance and circumvention by employees, implementation lag *etc.*? What remedial measures are called for to meet the existing situation?

4. What are the special steps (including formulation of laws) required to meet the specific disabilities faced by the women in workforce drawn from such categories as Scheduled Castes, Scheduled Tribes, Muslims etc. If there exists some laws to deal with the situation, are they satisfactory? If so, what re-formulations are called for?

5. Is there a case for separate laws to deal with the disabilities of rural women in workforce? If yes, what are the aspects which need special attention?

The Categories

1. The Self-employed Women

Examples : (a) Owner-managers of small industrial enterprises.

(b) Private practitioners of prestigious professions.

(c) Farmers.

2. The Women Employees

Examples : (a) Those with managerial/professional expertise—the upper middle/middle class.

(b) Those with skills and semi-professional expertise—the middle/lower middle class.

(c) Those with labour power—the lower class.

3. The Women with Specific Disabilities

Examples : (a) The Scheduled Castes.

(b) The Scheduled Tribes.

(c) The Muslims.

(d) The Rural Women.

"FROM WIFE TO WOMAN: FROM PATCH-UP TO BREAK-DOWN"

KRISHNA BAHADUR

I

The Normative Society and The Family

Manu prescribed norms for the 'man' and the 'woman' for their conduct and relations *inter-se* as well as inter-society. It would be uncharitable to assume that in doing so, Manu gave preference or an edge either to men or to women. His norms were basically aimed at bringing the rationalisation of the image and reconciliation of the personality of men and women taken as a unit in any given social structure. The great saint-jurist advocated for great respect for the women and prescribed norms and duties for a husband, a father and a son. He said that a husband was under an obligation to accord respect to his wife in the family status and to provide her full freedom for material and spiritual attainments. Similarly a father was bound to provide shelter, food and education to his children and if such children were daughters, to maintain them till they were married. A son was bound to maintain his old parents and also to lend his helping hand to the temporal and material activities of the family and to share the happiness as well as sorrows of the family jointly. The husband and wife and the father and son all taken jointly formed the family which in Hindu law is known as the joint family. The concept of the rights of women was thus acknowledged and legally recognised in the Code of Manu. Conversely, the women too had their duties towards the family and the society. They had to extend their cooperation and participation to their husbands in running the family which included of the young and the old, the children and the parents. In so running the family, the men contributed economically by their earnings and the

* M.A., LL.M., LL.D., Professor of Law, Banaras Hindu University, Varanasi, Formerly Head, Department of Law and Dean, Faculty of Law, Allahabad University and Banaras Hindu University.

women did so emotionally by keeping the family well knit into one unit. The purpose of Hindu precepts, traditions, convention, usages and even of the uncodified Hindu Law was to give equal status materially and emotionally to men as well as to women. It would be a misconception of Hindu legal philosophy to say that women were neglected or subjected or downgraded by the menfolk. Probably in no other social and legal system women were so much highly held as in the Hindu social and legal system. A study of the Hindu customs, usages, tenets, traditions, conventions and practices will show that the status of the women was, to speak purely in material terms of which much arguments are given in the present day, recognised not only in her own family but even in the society and she had her well defined rights as a daughter, a sister, a wife and a mother. The woman had a free, but not independent, life, an unrestricted, but not wayward, movement, a respected, but not a self-opinionated, personality. It is the conflict between these two values of the status of women that has created confusion today and has led to a sort of social and familial distrust between men and women. The need of the hour, therefore, is to rationalise this distrust so as to check the breakdown of the family and the stultification of the future and personality of those innocent, silent, bewildered and the sandwiched persons called the children. It is an established fact, nay the truth, that a very important cause of juvenile delinquency is the disquiet, sensitivised and superficial family and therefore the society and the law have to see that a rationalisation and reconciliation in the conflict of values of men and women are brought to protect the future of the children who are dragged in the breakdown of the family and matrimonial home without any fault of theirs or their willingness, volition or overtness. The whole conflict of values can be rationalised if we are able to find out the answer of *one and only one question* which is *whether the wife is a woman only and nothing more and whether all her claims be taken as justified because she is a woman first and then a wife*. This is a very vital question because these two terms 'the wife' and 'the woman' are the starting points or the cause of all conflict and of see-saw game between men and women. If a woman is 'the woman' alone, the values and human relations between men and women would be artificial and would be based and move around

primarily on biological needs. The question of integration of emotions and personalities of men and women would not arise there. If a woman is 'the wife' first and to the last, the unity of ideologies, the oneness of personalities and the rationalisation of views are possible and in fact achieved and it is here only that there is scope and ground to discuss about the rationalisation and reconciliation. The Hindu social and legal system has never considered and recognised superiority on the basis of sex and hence neither men were and are superior to women nor the *vice-versa* but both men and women are equal with well defined rights and duties for the purpose of integrity and stability of family and society. The creation of right-duty consciousness amongst men and women today is nothing but unfortunate and requires cool, unbiased; rational and objective thinking and it is for the intellectuals to come forward with frank, fair and objective analysis and solutions of men-women, male-female, husband-wife and stronger-weaker sex controversy lest it may reach the point of no return in which the greatest casualties would be the very social fabric, the familial and social integration and the innocents called the children who are just silent and helpless spectators of the game in which neither they are the participants nor the abettors or conspirators. No law would be called a civilised law if it punishes innocent persons and that too not directly but indirectly, rather vicariously. The problem of women therefore lies not so much in recognising their rights as it does on the basic issue whether a woman is 'the wife' in the first and to the last or she is just 'the woman' throughout and *it is the solution of this fundamental and basic issue which can save the family and the matrimonial home from breakdown specially in the urbanised society.* Laws, as we know, are only regulatory and not curative and had this not been so, nothing would have been easier for us than to sit continuously without any break for 24 or 48 or 72 or more hours in legislative bodies and make laws against all social evils and find the next morning that our society has become heaven. The eradication of an evil lies not so much in law as in the society itself. *It is therefore for the intellectuals, jurists, social reformers, sociologists, psychologists etc. to think and analyse the problem of the breakdown of the family and matrimonial home specially in the urbanised society and suggest ways and means of its prevention and cure keeping in*

view the unpalatable fact and the bitter truth that law is and cannot be the panacea of all evils specially of the evil of family and matrimonial home breakdown.

Whatever may be the time and space, some norms and values have to be lived up to, otherwise the society cannot move; it would be dead. Nobody would say that norms and values should not change with the changing society but what is important is that some norms and values must always be, in the everchanging time and space factors, recognised and adhered to. It is the problem of adherence or non-adherence, acceptance or rejection of norms and values that lies at the root of the breakdown of the modern family and matrimonial home. *No society can exist, breathe and move without a base and this base is provided by norms and values.* Had it not been so, jurisprudence and legal theory would have had no relevance and utility for structuring and evolving legal systems in the history of mankind.

II

The Urban Cult and Family Breakdown

People of the villages have always been attracted and lured to the city life partly because of necessity and partly because of the glamour, gaiety and the conveniences found in cities. After independence, India gave top priority to industrialisation in which manpower is one of the essential components. People therefore migrated to the industrial cities for employment and industrial activities. From this point started the delinking of the joint family. That part of the family which took up employment or engaged itself in small business became indifferent and unconcerned to that part of the family which remained in villages and engaged itself in agriculture. This delinking had sociological and psychological effects and the part of the family living in the cities considered itself superior to the part of the family left and living in villages. It was and is a fact that people living in cities have better and greater facilities for education and self-development, they are better informed and have more avenues for economic progress. Unconsciously or rather sub-consciously, these two sections of the people, the urban and the rural, became victims of complexes. They developed a love-and-hate attitude both

lamenting their social and economic conditions as bad and yet unable to break the cord of their relationship. With industrialisation and with the expansion of governmental establishment, a class of 'neo-rich' and of 'neo-Sahabs' emerged in India who considered themselves economically, socially and intellectually superior to those who were and are living in villages and were and are lowly placed in life. *Thus started the diffusion and dilution of norms and values in the society in India.* The 'urban cult' was the new phenomenon that took its birth as a result of industrialisation. Industrialisation led to urbanisation and both together led to the growth of a society and of a family which wanted all material comforts and social status. This new tendency brought forth new dimensions of human relations between man and man and the society or social set-up. Thus 'acquisitive individual' and 'acquisitive society' came and have come into existence where each wants to have the best of the others even to the extent of exploiting each other. Women also could not remain immune from this social phenomenon and they also wanted an independent and an individual personality. The constitutional guarantee of equal opportunities and avenues of education and employment afforded independent and individual personality and status to women. However, this phenomenon is limited to the urban society. Women want to carve out an independent and individual position for themselves in the family and are struggling for the same. This struggle has led to family tension as the male thinks that being the bread-earner and one who has to bear the burden of all family responsibilities even where he has a working wife, he is superior and more important and therefore should have the dominant and decisive role in the family and on the other hand, the woman thinks, whether she is a working woman or not, that she has a personality of her own and that she has and ought to have as much say and dominant role in the family as her husband has. If the two ways of thinking of the husband and wife reconcile the family goes on integrated but if it happens to be otherwise, the breakdown starts. One wonders why this struggle is not found, or at least is not known, in the rural families and way it is found, or at least is known, in the urban families while it is a well known fact that about 83% of population of the country which includes

men as well as women lives in the villages. There is a big interrogation mark as to why family and matrimonial tension and breakdown are not found in the rural society and families. Can it lead to a presumption that the rural women do not want an independent and individual personality or they do not want to have an important role and position in the family or they do not want to exercise their rights or are they living a life of servitude incapable of carving out their position and status or are they ignorant or do they not want to have an independent economic and social security. A negative approach to these interrogatories may lead to absurd situations as rural women also want to be socially and economically at par with urban women. Urbanisation is therefore to a very great extent responsible for the family breakdown. Urbanisation has led to a change in the outlook and philosophy of life of the people. Acquisitiveness, craze for material comforts, longing for the individualisation of one's personality and lack of moral education have cut at the roots of values and norms at least in the urban society. Individualisation and materialisation which are the outcome of industrialisation have reached a stage where the aim of the individual is 'comfort and comfort alone and comfort at all costs.' The husband takes the wife as a means of comfort for him, the wife takes the husband as one over whose pocket and self she has or ought to have the absolute right, the father takes his children as mere physical reproductions and eligible to claim from him only the material comforts and facilities for education and food and shelter and the children in turn see to it that their father or parents are provided best medical aid and comforts in the nursing homes and old-men homes and not in their family and homes. Urbanisation has made the man self-conceited, self-seeking, apathetic and selfish and these 'qualities'—good or bad—are the important reasons for the family breakdown.

III

The Family Breakdown in Prospects

Industrialisation is necessary for the development and progress of any country, be it developed, undeveloped or underdeveloped and this is true for India also. Urbanisation is a necessary and

unconscious and silent manifestation of industrialisation and hence industrialisation and urbanisation always go together and both of them being the facts of the modern world cannot be denied and hence suggestions and solutions to prevent or rationalise the family breakdown have to be made in the context and background of these two facts.

Let us be honest and therefore boldly admit that the joint family system has now become a myth. Let us equally honestly admit that individualisation of personality has become the outlook and philosophy of life of the individual not only in India but throughout the world. It should be in this background that we should evolve solutions and make suggestions with regard to the prevention and or rationalisation of the family breakdown in India. In the present socio-politico thinking, social structure and concept of family and matrimonial life, exercises to 'patch-up' the break-down would be futile. Such an exercise would also be futile because of various legislations recognising and guaranteeing the rights on the basis of sex in matters of succession, adoption, maintenance, marriage, employment etc. Sociologists, psychologists, jurists and social workers have found that once the process of breakdown of a family begins, it does not stop till the family in truth and reality is broken down. It is unfortunate but a reality and one has always to live with realities howsoever fortunate or unfortunate they might be.

A few suggestions to prevent the family breakdown and if breakdown, to rationalise the effects may be made.

(4) In the first instance, moral education at the primary and higher secondary stage of schooling be made compulsory so that the child during the formative stage of his personality imbibes the values and norms which are the guiding force of any social system. Moral education be not based on dogmatic and conservative lines but be so oriented and chiselled as to fit in with the modern life of industrialisation and urbanisation. A new approach and a socially relevant text will have therefore to be drawn up by a team of highly educated, broadminded, fair and frank persons. Moral teachings from all sects, castes, creeds and religions will have to be drawn up.

(B) Matrimonial disputes should be settled expeditiously. There is already public opinion gaining weight for the establishment of Family Courts but a rethinking be given to their constitution at least with regard to the following points:

- (i) Whether it would be advisable to have only women as the presiding officers of Family Courts. This suggestion is a serious one as it is fraught with consequences of bias, ill-will, lack of faith and further deterioration of matrimonial relations.
- (ii) Whether the normal principles of evidence and procedure would be applicable to the Family Courts. Again, it may not be overlooked that a deviation from such normal principles may erode the rule of law which is the ground-norm of all legal systems.

(C) If once we have recognised that, through law, matrimonial cords can be broken, then it is wise and human on our part to make the tie broken quickly with grace and without any sense of bitterness left in trail between the parties. From this point of view, should we not dispense with the provisions of restitution of conjugal rights and of judicial separation and have only divorce.

(D) If the provisions of restitution of conjugal rights and of judicial separation are dispensed with and only divorce is retained in the statute book, no divorce should be granted within five years of the marriage.

(E) As soon as the divorce petition is submitted in the court, it should be obligatory on the court to dispose it off within six months and if it is not so done, reasons for the same be communicated to the High Court and thereafter it should be disposed of within the next three months on priority basis and it should be the legal and judicial duty of the District Judge to see that it is disposed off within such three months and if it is not disposed off even within the next three months, the High Court may take such action as it deems fit and necessary for the disposal of the petition. If the petition is not disposed of within the first six months, it would be the presumption of law that the balance of convenience is in favour of the plaintiff and he or she shall not be liable for

any expenses that may be necessary to be incurred thereafter and the same shall stand waived in favour of the plaintiff.

(F) No adjournments be allowed in a matrimonial dispute and unless there are cogent reasons heavy costs not below two hundred rupees be awarded if an adjournment is allowed.

THE PROTECTION OF THE RIGHTS OF WOMEN IN THE J & K STATE: A HISTORICO-SOCIO-POLITICO AND CONSTITUTIONAL ANALYSIS

VIDYA BHUSHAN

Woman is the central figure in our society which inspires confidence, inculcates and prepares children to pursue their goals relentlessly. History bears testimony to the fact that heights of patriotism, selflessness, fearlessness and determination are imbibed in children only through the persistent efforts of mothers. But unless woman is provided the prerequisites of education for developing her vision, proper health care and social security, respect and status, her efforts are likely to fall short to accomplish the ultimate objective of a strong civilized and prosperous nation.¹

Through their long history, the most beautiful Kashmiri women witnessed varying fortunes. "At times women had risen to pinnacles of glory, distinguished themselves as rulers in their own right, as regents of minor princesses, as powerful queen-consorts, as diplomats in peace and war, as commanders of the armies, as thrifty landladies, as builders and reformers, as protectors of the religious lore, as singing and dancing beauties and also earned names in keeping homes."²

Broadly speaking, from early times down to the thirteenth century A.D., Kashmiri women enjoyed remarkable freedom, wielded ample power and exercised responsibility, which gave them a high status in society.³ The happiest period for women was when the country came under the sway of Buddhism.⁴

* M.A., LL.B., B.Ed., Ph.D., Reader, P.G.D. of Political Science, University of Jammu, Jammu-180 001.

1. *Jammu and Kashmir (1975 79)* Directorate of Information (Publications Wing), Jammu & Kashmir Govt., Srinagar, year not known, p. 101.
2. Bazaz, P.N. : *Daughters of Vitasta*, Pamposh Publication, New Delhi, 1959, p. 2.
3. *Ibid.*, p. 3.
4. *Ibid.*, p. 14.

However, with the establishment and consolidation of Muslim rule in the valley, women were gradually and increasingly deprived of these rights and privileges. Their sole meaning and purpose of life became to keep the houses, to gratify the desires of their husbands and to procreate.⁵ But in the wake of Afghan onslaught followed religious persecution, rapine and devastation.⁶ Purdah was more rigorously enforced, women were physically and spiritually shattered, their presence in every sphere of social activity was totally eclipsed,⁷ and they meekly submitted to the expropriation and exploitation.⁸ The Sikhs who succeeded the Afghans were no less tyrannical and cruel.⁹ Dogras, the new masters, who were in the initial years busy in consolidation of their newly acquired kingdom, and annexation of the frontier areas lying in the north, evinced some interest in the moral and social uplift of the woman.¹⁰

Gulab Singh is known to have issued ordinances against *Sati* system as early as 1825¹¹ when he was a Raja of Jammu Jagir. Later on he sent his representatives to attend the Social Reforms Conference held at Lahore in 1852 and got incorporated his *Illans* against infanticide and *Sati*. Ranbir Singh also issued strict orders for prohibiting *Sati* system and encouraged female education. The number of girls attending schools in his time rose.¹²

But on the whole at the close of the last century Kashmiri women had sunk to a low level of destitution and ignorance. Because of exploitation and a low status in society, they lost refinement of their mind and self-confidence, spirit of revolt and

-
5. *Ibid.*, p. 15.
 6. *A Handbook of Jammu & Kashmir State*, 3rd Edition, Publicity Department, J & K Govt., Jammu, 1947, p. 22.
 7. Bazaz, P.N., *Daughters of Vitasta*, *op. cit.*, p. 16.
 8. *A Handbook of Jammu and Kashmir*, *op. cit.*, p. 22.
 9. Bazaz, P.N. : *Daughters of Vitasta*, *op. cit.*, p. 18.
 10. Charak, Dr. S.D.S. : *History and Culture of Himalayan States*, Vol. 5, Light and Life Publishers, New Delhi, 1980.
 11. *Ibid.*
 12. *Selections from Punjab Correspondence of the Board of Administration for the Affairs of Punjab*, Vol. 1, Govt. of Punjab, Lahore, 1852, pp. 400-450.

sense of righteous indignation.¹³ In short, the 19th century witnessed the most complete and degrading subjugation of women in the history of mankind.¹⁴

The religious dogmas were also responsible for the pitiable condition of women in our State. They were considered as secondary citizens with no independence of any sort. The religious laws governing the system of marriage, divorce, inheritance, polygamy, polyandry, dowry system, widow remarriage and debarring widows from performing certain social functions were yet another discrimination against women.

The feudal society, like the semi-feudal and semi-capitalist system of today, treated women as personal property of men. The male oriented and male dominated value system thus swayed the society throughout the history and subordination of women appeared in every walk of life. The social controls on women, restraining their public movement and appearance also to a great extent, accounted for their losing self-confidence and initiative. The insecurity, helplessness and physical weakness made women more subservient and socially dependent. The dowry, the bride price, which were the most cruel traditional practices, continued with newer dimensions and the increasing incidental demands of in-laws after marriage led to the further deterioration of women's conditions.

Violence or wife-beating, found in several families irrespective of their social background, was probably one of the most accepted crimes committed against women.

But the waves of the western ideas opened a new era of progress and modernization in the State. And in spite of the ferocious opposition of the government and supersitious elders of Hindu and Muslim communities, the foreign Christian missionaries pioneered a movement for the betterment of Kashmiri women.¹⁵ The last Dogra Maharaja also tried his best to raise

13. Bazaz, P.N.: *Daughters of Vilasta*, *op. cit.*, p. 18.

14. Whittick, Arnold: *Woman into Citizen*, Athenacum with Frederick Muller, London, 1979, p. 17.

15. Bazaz, P.N.: *Daughter of Vilasta*, *op. cit.*, p. 19.

the percentage of literacy among the women¹⁶ and to ameliorate their socio-economic conditions.¹⁷ During his reign the number of educational institutions for girls increased, provisions were made to admit girls below 10 years in boys' school in localities where no separate girls schools existed, girl students were also admitted in the colleges of the State and 7 post-matriculation scholarships of Rs. 40 each were provided to girls desirous of pursuing college education in British India.

The deterioration of socio-economic conditions and greater strains and stresses, which led to the economic insecurity of man in inter-war period and after, further increased subjection of women and degradation of their living and working conditions. Women were, thus, alienated from their families, from their native places, their jobs, from land and from human dignity.¹⁸

Moreover, the post-war emergence of new productive forces, the transformation of their ownership the changing productive relationship and impending super structures created distinct classes, new institutions and developed new laws which further relegated women's position to an unparalleled low relative to others in the social hierarchy and economic status.¹⁹ Hence larger number of women became increasingly poor before independence.

In spite of all these limitations, the Kashmiri women played an important role in the Freedom Struggle of Kashmir. They suffered in their thousands, and passed into oblivion without any recognition or fame²⁰. Still, from all walks of life they came forward with redoubled enthusiasm to participate in the last phase of popular resistance (i.e., Quit Kashmir Movement of 1946)²¹, against the autocratic rule under the banner of National Confer-

16. Bhushan, Indu: *Govt. and Administration of Jammu & Kashmir*, An Unpublished Dissertation submitted to Lucknow University, March 6th, 1942, pp. 162-166.

17. *A Hand Book of Jammu and Kashmir State*. H. Highness Govt. Jammu & Kashmir, Jammu, 1947, p. 50.

18. Manohar, K. Murali: *Socio-Economic Status of Indian Women*, Seema Publications, New Delhi, 1983, p. 118.

19. *Ibid*, p. 115

20. Yasin, Mohammad: *History of the Freedom Struggle in J & K*, Light and Life Publishers, New Delhi, 1980, p. 203.

21. Bazaz, P.N.: *Kashmir in Crucible*, p. 35.

ence headed by a dynamic leader Sher-i-Kashmir, Sheikh Mohd. Abdullah.²²

The leadership of National Conference was very much conscious of the deplorable conditions of womenfolk in the State—as well as of the fact that the status of a woman, at whose breast humanity is nourished and in whose lap civilizations are cradled, is a measuring rod of the civilization. They were also aware of the fact that the inherent strength of women, if suitably channelised, could be directed towards national development. That was why the party in its blueprint for the socio-economic transformation of the State in Naya Kashmir Programme of early 1944²³, among other things, promised to provide safeguards for the protection of women's socio-politico-economic interests. Section 12 of Naya Kashmir Programme runs as follows :

Women citizens shall be accorded equal rights with men in all fields of national life, economic, cultural, political and in the State services.

These rights shall be realised by affording women the right to work in every employment upon equal terms and for equal wages with men. Women shall be ensured rest, social insurance and education equally with men. The law shall give special protection to the interests of mother and child. The provisions of pregnancy leave with pay and the establishment of wide network of maternity homes, nurseries and kindergartens shall further secure these rights.²⁴

However, it is a known fact that Kashmir was the only one of the hundreds of the former princely States which was given the right to have a separate Constitution framed by its own Constituent Assembly.²⁵ But it is regrettable to point out that from women which constitute about half of the population of the State²⁶,

22. Yasin, Mohammad : *History of the Freedom Struggle in J & K*, op. cit., p. 204.

23. Bhushan, Vidya : *The Framing of Jammu and Kashmir Constitution*, unpublished Ph.D. thesis, University of Jammu, Jammu.

24. *New Kashmir*, published by Mr. K.N. Bamzai, Director, Kashmir Bureau of Information, 5 Prithvi Raj Road, New Delhi, pp. 14-15.

25. Bhushan, Vidya : *The Framing of Jammu and Kashmir's Constitution*, op. cit., p. 99.

26. *Census of India*, Vol. VI, J & K Part II-A, p. 78, Table II. Female population of J & K State was 1, 517,025 in 1951.

were drawn only two women, i.e., 2.56%²⁷ of the total membership of the Consembly, and their representation in the Committees of the Consembly was 4.35%²⁸ of the total membership of the Committees. The Consembly of Kashmir which intended to shape the future destiny of the State and to implement the cherished objectives of Naya Kashmir programme also discussed and debated the question of protecting the interests and rights of womenfolk and made certain proposals. Section 10 of the Kashmir Constitution of 1956, therefore, provides that "the permanent residents of the State shall have all the rights guaranteed to them under the Constitution of India"²⁹. "The permanent residents" obviously, includes the women.

Besides the fundamental rights, the Kashmir Constitution also provides a list of Directive Principles of State Policy for the amelioration of the socio-economic status of women. Though these directives are not enforceable in the courts of law, nevertheless, these are declared to be the fundamental in the governance of the State³⁰ and like the affirmative instructions to the government to do certain things are the instructions which give to the Constitution a living spirit. In addition to others, one of the directives, which comprises a fairly comprehensive moral code for the rights of women, provides that the State is directed to secure to all women the right to equal pay for equal work, maternity benefits and medical care, reasonable maintenance to abandoned married women; full equality in all social, educational, political and legal matters, special protection against discourtesy, defamation, hooliganism and other forms of misconduct.³¹ The State is directed to combat ignorance, superstition, fanaticism, communalism, racialism, cultural backwardness and to foster brotherhood and equality among all communities³² which includes womenfolk. The State, within the limits of its economic capacity and development, is directed to make effective provisions for securing for

27. Bhushan, Vidya: *The Framing of Jammu & Kashmir's Constitution*, op. cit., p. 145.

28. *Ibid.*, p. 228.

29. *The Constitution of Jammu & Kashmir*, Srinagar, 1968, p. 4.

30. *The Constitution of Jammu & Kashmir*, op. cit., S. 12, p. 4.

31. *Ibid.*, S. 22, p. 6.

32. *Ibid.*, S. 25, p. 6.

women, who are permanent residents of the State, right to work, i.e., the right to receive guaranteed work with payment for labour in accordance with the quality and quantity subject to a basic minimum and maximum of wages established by the law.³³ It is also provided that the health and strength of working women are not abused and they are not forced by economic necessity to enter avocations unsuited to their sex, age or strength.³⁴ The State is also directed to secure to every permanent resident including women right to free education upto the university standard.³⁵

These directives are not taken by the government as pious homilies but have been and are being implemented.

It would not, however, be an easy task to survey the progress made by the Government of Kashmir in the implementation of the directives relating to ameliorating the socio-economic conditions of Kashmiri women. Nevertheless, a brief reference to some of the outstanding achievements made in this direction particularly during the two half decades since the promulgation of the present Constitution of Kashmir would be in order.

For securing the rights of women, the State Government has taken several steps. Steps are also underway for enforcement of an Act which will ensure equal remuneration to women and men for the same work. There are certain fields in which women are exclusively absorbed, e.g. woman education wings and nursing profession. They are also given equal opportunities for employment in other sectors. A good number of women are working in various government offices. In case of women employees the period of maternity leave admissible has been extended upto 90 days.³⁶

Each district hospital is utilizing 50% of beds for the females including children. Each family welfare centre has one lady doctor, one lady health visitor, one auxiliary mother³⁷ to render

33. *Ibid.*, S. 19(a), p. 5.

34. *Ibid.*, S. 18(b), p. 5.

35. *Ibid.*, S. 20(a), p. 5.

36. *Jammu & Kashmir 1975-79*, Directorate of Information (Publications Wing) J & K Govt., Srinagar, year not known, p. 11.

37. *Ibid.*

specialised service to the womenfolk. The number of family planning centres and sub-centres has gone up to 182, number of nurses to 532 and midwives to 1,105.³⁸ Women are provided facilities for health, family welfare and nutrition. A sum of Rs. 15.8 lakhs has been earmarked for providing special nutrition to 145 expectant mothers in Udhampur district only.³⁹ Under *Rehbar-i-Sehat Programme* and Multipurpose Health Worker Scheme, health care services are being provided to the women in the rural areas.

Over and above these facilities, one women's hospital has been set up at Srinagar where specialised medical services are available for women.

As education is the basic imperative for the women to be strong and healthy both in brain and brawn some measures have also been undertaken to increase literacy among them. Kashmir State is the only State in the Indian Union to have provided free education to all right up to the university level. There are 2586 Primary Schools, 250 Middle and 16 High and Higher Secondary Schools being manned by over 11,000⁴⁰ female teachers. About 2.50 lakh girls are receiving education.⁴¹ Separate colleges for women have also been opened to provide higher education to them. Because of recent economic constraints, the poorer families find no alternatives but to send their girls to work to help their elders to earn a livelihood. To educate them, 1735 part-time educational centres have been opened in the State where more than 33,000 children including girls are being given primary education.⁴² The poor girl students are being provided free textbooks, stationery, uniforms, scholarships and other incentives. Moreover, number of centres of non-formal education for other girls who could not go to formal schools have also been

38. *Jammu & Kashmir, At a Glance*, Director General of Information and Public Relations, J & K Govt., Srinagar, February, 1983, pp. 11-12.

39. *Developmental Activities in Districts—Udhampur*, Director of Information, J & K Govt., Srinagar, Sept. 1982, p. 17.

40. *Jammu & Kashmir—1975-79*, *op. cit.*, p. 10.

41. *Ibid.*

42. *Kashmir Today*, Vol. 8, No. 24. Director General, Information and Public Relations, J & K Govt. (Publication Division), Srinagar, year not known, p. 9.

similarly increased. The number of adult education projects and adult literacy centres for women have also gone up. As a result, the literacy percentage of females has gone up to 15.82 in 1983.⁴³ Women now enjoy the right to vote. The State Constitution provides for women to be nominated as members of the legislature if they are not adequately represented. Women have also been given representation in the various district and block level development boards of the State to ensure their active participation in the development efforts.

For social upliftment of the women, the government has set up 120 welfare centres where women are imparted training in various crafts. There are 9 *Nari Niketan* and '*Fallah-i-Musturat*' centres. In each centre 25 women are accommodated for training purposes and paid stipends.⁴⁴ Centres for training facilities in cutting, tailoring, knitting, embroidery have also been established. Sewing machines are given to widows and destitutes. The rural women camps are being organised also. Under the District Industries Centres Programme, several handicraft centres are being established for the economic uplift of the women especially in rural areas. An institution, namely, '*Markaz-i-Behabudi-Khawateen*' [Centre for Welfare of Women] has been started at Miskeen Bagh, Srinagar where 600 girls and women from poorer classes are accommodated for imparting training in six crafts which ultimately help in supplementing their income.⁴⁵

In spite of the paucity of financial resources, the State government has done, and is doing much, for the betterment of women. However, whatever has been done so far to give them an equal status with men has had very little effect on their life-style. So far as unemployment, illiteracy, low health standards are concerned, they are still more adversely circumstanced as compared to men.⁴⁶ They still, thus, continue to face enormous problems in actual life.

43. *All Round Progress in Jammu and Kashmir*, Director General of Information and Public Relations (Publication Division) J & K Govt. Srinagar, Oct. 1983, p. 9.

44. *Jammu & Kashmir 1975-79*, *op. cit.*, p. 104.

45. *Ibid.*

46. *Women's Development, Some Critical Issues*, Report of a Seminar of Women Legislators, sponsored by Gandhi Peace Foundation in collaboration with

The benefits of the abovementioned social legislations have not reached the majority of women. Most of them are still not aware of their rights. Even if some of them are aware of the rights, the legal redress is not availed of because it involves a time consuming and expensive process.⁴⁷

In order to improve their economic status, economic role-based organisations of women such as cooperative, trade union and self-employment entrepreneur groups should be organised, particularly in rural areas; more and more training facilities should be provided to them for achieving higher productivity in agriculture, side jobs and family employment. There should be reservation for women in all training and professional colleges. More attention should be paid to population, education and family planning as these are crucial to improve the status of women. Elementary education should primarily be entrusted to women at policy making, advisory, administrative and operational levels. The law and procedures should be modified to eradicate all the evil practices for changing the thinking of menfolk about the fair sex. Procedure for redressing their grievances should be simplified relating to their arrest and remand in police station should not be ornamental in nature but productive in practice; laws relating to marriage, divorce inheritance, polygamy, polyandry, dowry, widow-remarriage and certain atrocious practices such as rape, assault and wife-beating should be recast keeping in view the best interests of womenfolk. The cases relating to rape, eve-teasing, kidnapping, abetment, bride burning, dowry death should preferably be investigated and adjudicated in camera by women. Severe punishments should be provided for heinous crimes like rape, kidnapping and abduction of women, their wrongful confinement and their being forced to indulge in immoral practices. There should be speedy disposal of such cases. The government should undertake steps for bringing about an entire change in the attitude of society towards fair sex and equip them to stand on their own feet. Hoodlums should not be provided political patronage.

Indian Council of Social Sciences Research, Department of Social Welfare, Govt. of India and UNICEF, Harwah Publications, New Delhi, 1978, p. 57.

47. *Ibid.*, p. 57.

Social pressure can also prove to be the most potent instrument for containing and preventing such crimes. The voluntary social organisations could be helpful in building up a proper social stance against such crimes, and extinguishing social prejudices against deserted wives, widows and widow remarriage.

In brief, a glance at the history of the position of women in Jammu and Kashmir State shows that vast strides have been taken to ameliorate their conditions; to bring them as far as possible at par with men. However, the progress so far is only a first step which should lead to a heightened consciousness about the disabilities which one-half of human population suffers in developing societies like ours. This can partly be done by passing suitable laws. But main emphasis should be on bringing about a change in social values and norms through education and community action.

EXPLOITATION OF WOMEN : A STUDY OF SOCIAL NORMS

REKHA CHOWDHARY

Equality on the basis of sex and individuality of women has been recognised by the Indian Constitution.¹ The Preamble of the Constitution aims at providing to all its citizens equality of status and of opportunity as well as justice — Social, Economic and Political. Moreover, a number of laws have been enacted to improve the lot of women.² But neither the Constitution nor the laws have been successful in changing the status of women. They continue to be exploited as a result of which they remain dependant — socially, economically and psychologically — upon men.³ The exploitation of women is based upon traditional norms and values of Indian society. These norms and values are a reflection of the patriarchal form of society, “a male dominated society where the woman’s place has been primarily confined to the home, her role limited to procreation, upbringing of children, and catering for the needs of menfolk by way of

* Lecturer, Postgraduate Department of Political Science, Jammu University, Jammu.

1. Arts. 14, 15 and 16 are particularly important in so far as they enshrine the principle of equality and absence of discrimination. In fact, women are treated as exceptional class requiring special protection. Hence, State can make special provision for them under Art. 15(3).
2. Since independence, women of India have been legally emancipated by virtue of various Acts and statutes which include the Special Marriage Act of 1954, Hindu Marriage Act of 1955, the Hindu Succession Act of 1955, the Hindu Adoptions and Maintenance Act of 1956, the Hindu Minority and Guardianship Act of 1956, Suppression of Immoral Traffic in Women and Girls Act of 1956, Dowry Prohibition Act of 1961, the Medical Termination of Pregnancy Act of 1972. But most of these laws are not fully enforced.
3. A number of studies conducted by social scientists conclude that women are not equal to men and that they suffer from various social disabilities. See for example Hate, C.A. : *Changing Status of Women in Post Independence India*, Allied Bombay, 1969; Mohita, Rama : *The Western Educated Hindu Women*, Asia Publishing House, Bombay, 1970; Kapur, Promilla : *Marriage & Working Women in India*, Vikas Publishing House, Delhi, 1970; Sengupta, Padmini : *The Status of Women in India*, India Book Co., Bombay, 1973; Baig Tara Ali, *India's Women Power*, S. Chand and Co., Delhi, 1976.

creature comforts".⁴ Although the Indian society is subject to various forces of modernisation, the traditional role and values are relevant for women even today. There still exists the segregation of roles between men and women as well as division of authority. Men continue to be in positions of authority and women in the positions of inferiority and subordination. The continued relevance of traditional values to the modern society is because of the process of socialisation which helps in transmitting the cultural values from generation to generation. Through the process of socialisation, these values are incorporated into the personalities of members of the society so that they come to accept them and interact accordingly.

The general acceptance of this traditional value structure by the society has acted negatively in the achievement of cherished principles of equality as envisaged in the Constitution and the laws made by the State. Women continue to be in inferior position, not because legal protection is missing, but because social norms make them so.⁵ The inferiority of women is indicated by the fact that Indian woman does not possess an identity of her own. She owes her identity to a particular relationship with man. She is either a daughter (of father), or a wife (of husband) or a mother (of a son). The very existence of a woman is related with marriage and procreation. To be socially accepted, a woman must be married and be a mother, preferably of a son. Both the single and barren women possess lower status in society. The single woman, whether spinster, divorced or widowed is not looked upon with respect by the society. Spinsterhood is viewed with suspicion. Moreover, spinsters face a lot of harassment from the male members of society.⁶ Thus for their social security, spinsters have to depend upon male members of family — either brother or father. Similarly problems are faced

4. Rudra, Ashok : *Cultural and Religious Influences in Indian Women* by Devaki Jain (ed.), Publication Division, Ministry of Information & Broadcasting, Govt. of India, 1975, p. 40.

5. Hindu Scriptures, such as Manusmriti, described the dependent position for women throughout her lifetime — dependent firstly on her father and then on her husband. In the four stages of life, *Brahmacharya*, *Grahashta*, *Vanaprastha* and *Sanyasa*, women were excluded from the last two and were supposed to focus on their role as mother and housekeeper.

6. See Tara Ali Baig, *op. cit.*, pp. 129-133.

by divorcee women. Divorce lacks social sanctions. According to traditional Hindu thinking, marital bond is sacred, indissoluble and irrevocable. The starting of a matrimonial case is considered to be a disgrace for both the families involved. Women are supposed to make necessary adjustment in marriage through self-sacrifice, devotion and loyalty. Social attitudes generate a kind of hatred against divorcee women. Whosoever may be at fault, only she is held responsible for the break-up of her marriage. Thus women prefer to suffer in silence rather than seek divorce.⁷ The lot of the widow is still worse. She is blamed for the death of her husband. She is considered to be an evil whose presence is unwelcome during auspicious occasions. In traditional families she is even denied the daily comforts of life and is exhorted to live a hard life of austerity and abstinence.⁸

Thus the status of woman in the society is dependent upon her marital status. A devoted Hindu woman makes a deathwish every day; that she may die before the death of her husband. She undergoes a number of fasts in order to secure a shorter span of life as compared to that of her husband.

Besides being married, a woman to be socially accepted has to bear children. A barren woman has lower status as compared to a woman who has brought forth children. She lives under constant sense of insecurity as the husband has the social sanctions to cast off a barren woman and marry another. Motherhood is an important achievement for a woman as the very justification of her existence depends upon it. The lot of mothers who bear male children is better than those who give birth to daughters.⁹ With the birth of a son, a woman is granted certain privileges which were denied to her so far. She is treated at par with elder women of the family and is granted some role in the family decision-making. On the whole, with the birth of a son, a woman is able to attain respectability both in her family and in the society.

7. The figure of women who have sought separation and divorce has been very low. Till 1971, it was 0.35 per cent women in rural areas and 0.25 per cent women in urban areas.

8. See Tara Ali Baig, *op. cit.*, pp. 169-171.

9. In many traditional families, the news of the birth of a daughter is treated as a family calamity. Friends and relatives express their sympathies to the members of the family upon the birth of a girl.

Since the status of Indian woman is related with her roles as wife and mother, marriage becomes the ultimate purpose of the life of a girl.¹⁰ An unmarried girl is a source of constant anxiety to her parents. They want to get her married off early as she may not be wanted in matrimony if not married early. Due to the fear that the girls may remain unmarried, many parents are forced to 'buy' their son-in law with the help of dowry.¹¹ There is a systematic mechanism regarding fixation of dowry according to which each husband is viewed on the basis of his occupation or social status.

The life of a married woman is a difficult one due to some norms relating to her role as a wife and a daughter-in-law. After marriage, a woman has to leave her natal family and join her husband's family. As a member of the new family, she is faced with the problem of adjustment in an environment of unfamiliar expectations. She has to adopt the new family as her own and she is expected to have an immediate adjustment in the new home and give her love and respect to the members of that family as to her blood relations,¹² with whom she had grown and lived till then. She is expected to learn new values and forget all those that she had learnt in her natal family. In the words of Mandelbaum, "a young wife, of any *Jati* or religion, usually has the lowest status in the family and is given more onerous chores. Whatever goes awry, she is apt to be called the culprit".¹³ Thus she is expected to make necessary adjustments through self-sacrifice, devotion and loyalty. Sole joy in the life of woman is based upon the satisfaction of her husband and his family. Her interest, pride and status are not seen to be distinct from that of her husband and his family.¹⁴

10. Everything in the upbringing of a girl, her socialisation and training into future roles and values directs her to marriage.

11. In 1961 a Dowry Prohibition Act was passed to root out the evil of dowry but it has not really been enforced. Dowries are still demanded and offered. Parents act 'safe' by giving dowry so that their daughters are not harassed after marriage. In case dowry fails to satisfy the husband and his relatives, the whole marital life of a new bride is jeopardized.

12. In many cases women are forced to respect even those members of new family who regard a woman and her natal family with hatred.

13. David G. Mandelbaum: *Society in India*, Vol. I Continuity and Change, Berkley, 1970, p. 86.

14. Jyoti Barot: 'Modern Trends in Marital Relations' in *The Indian Family*

because they could not find the 'right man' (with higher education and social-economic status).

Thus Indian women are, by and large, tradition-oriented in spite of their education. They also accept those social customs and values that are widely accepted by the society. The findings of Carmack's study, though conducted thirty years earlier, are still relevant.²⁰ This study sought to discover how Indian girls were socialised into traditional feminine roles. It was found that Indian women while responding to society's changing needs, continue to accept their traditional roles and values selectively.

If and where the change in the attitudes and self-perception has come, it has created the problem of adjustment. In traditional family the uneducated women would accept the traditional role as a submissive wife and daughter-in-law and adhering to the values of self-restraint, self-sacrifice and self-effectiveness. But modern educated women may find it difficult to accept her role as passive spectator. Naturally, it is bound to create a situation of strain and conflict where a woman feels and thinks in terms of her individual role and status. The society is still not prepared to accept such a type of woman.

Besides education, modernisation has opened another avenue for women, extra-domestic work, an area traditionally reserved for men. More and more women have joined the rank of working women. But the acceptance of jobs by women is not a reflection of the development of individuality or change in the self-perceptions of women. If we find women working, it is due to the economic strains which the modern family is facing rather than any other reason. In majority of cases, women have opted for work to augment income rather than for self-satisfaction. Society also has come to accept the working women for economic reasons.²¹ Husbands and their relatives do not consider it undesirable if

20. Margaret L. Cormack: *The Hindu Women*, Columbia University Press, 1953.

21. Sec Ross, A.O.: *The Hindu Family in its Urban Setting*, University of Toronto, Toronto; 1961; Ranade, S.N. and P. Ramachandran: *Women and Employment*, Tata Institute of Social Sciences, Bombay, Series No. 20; Kapur, Promilla. *Marriage & Working Women*, Vikas Publishing House, Delhi; Sengupta, Sonkar: *A Study of Women of Bengal*, India Publications, Calcutta.

women go in for jobs. On the contrary, a woman going in for jobs is considered to be a welcome situation since it means extra income. Job, thus, becomes an asset for a girl in the matrimonial market. In the matrimonial advertisements, preference is given to the working girl. Following examples will explain the situation :²²

Wanted beautiful preferably employed bride for handsome Punjabi Arora boy ; B. Com. .

Wanted Sindhi working girl for handsome Civil Engineer, Delhi Development Authority.

Wanted employed mate, preferably Bank or Central School, for Dogra Brahmin boy.

Wanted Teacher/Professor/Medico girl for Punjabi Khatri handsome, 25 years, C.A., Executive.

Marriage being the goal, many unmarried girls take up jobs to increase their matrimonial qualifications. For a working woman, marriage is more important than career and if she has to make a choice between the two, she would choose marriage and sacrifice her career. After marriage also, if occupational sacrifices are to be made, the wife would happily sacrifice hers. Home work and child care still being the dominant role of women, her career is subordinated to that of her husband's. It is considered to be an additional work. Along with the responsibilities of career, working women have to do all or most of the household work. Men though helped by woman in the income of the family refuse to share the work and if they do, they do it grudgingly with a feeling that it is not part of their duty. Thus women are compelled to manage two full-time jobs with little or no support of men. According to Promila Kapur the tendency of husbands to act in the belief that household jobs and child care are the wife's duties is one of the most significant factors in marital discord.²³

Besides increasing responsibilities of women, marriage combined with jobs provide lot of strain upon women. They are under constant pressure to perform well in both the spheres. In many cases they develop complexes if they are not able to give personal care to their children. They are usually blamed for

22. *Times of India*, Feb. 5, 1984.

23. Promilla Kapur : *The Changing Status of the Working Women in India*, Vikas Publishing House, Delhi, 1972, p. 27.

neglect of children and husband. To quote Tara Ali Baig: 'In her efforts to do her job to justify her salary, she offends the family, and in her often abnormal efforts to satisfy the family, she lets down her job and herself in particular.'²⁴

Thus modernity has put one more burden on women because in spite of taking jobs, they are expected to conform to the traditional values. Roles have changed but traditional expectations continue to exist. If adjustments are made, they have generally been made by women and not by the society. We can safely conclude agreeing with Baig that, "One thing is clear, in emerging slowly into modern world, woman is not yet getting best of both worlds — old and new. In fact, it is in many cases the opposite."²⁵

BIBLIOGRAPHY

- Appadorai, A: *Status of Women in South Asia*, Calcutta, Orient Longmans, 1954.
- Baig, Tara Ali: *India's Woman Power*, Delhi, S. Chand & Co., 1976.
- Belok, Michael (ed): *Women in International Perspective*, Meerut, Anu Publication (undated).
- Cormack, Margaret L: *The Hindu Women*, Columbia University Press, 1953.
- Das, M.S. & P.D. Bardis (ed): *The Family in Asia*, Delhi, Vikas Publishing House, 1978.
- De Souza, Alfred (ed): *Women in Contemporary India*, Delhi, Manohar Book Service, 1975.
- Everett, J.M.: *Women & Social Change in India*, Delhi, Heritage Publishers, 1979.
- Gandhi Peace Foundation: *Women's Development: Some Critical Issues*, Delhi, Marwah Publications, 1978.
- Goldstein, Rhodal: *Indian Women in Transition—A Bangalore Case Study*, New Jersey, The Scarecrow Press, 1972.
- Gupta, Raj (ed): *Family and Social Change in Modern India*, Delhi, Vikas Publishing House, 1976.
- Hate, C.A.: *Changing Status of Women in Post Independence India*, Bombay, Allied Publishers, 1969.
- Indian Social Institute: *The Indian Family in the Change & Challenges of the Seventies*, Jullundur, Sterling Publishers, 1972.
- Jain, Devaki (ed): *Indian Women*, Delhi, Publication Division, Ministry of Information & Broadcasting, 1975.

24. Tara Ali Baig, *op. cit.*, p. 206.

25. *Ibid.*, p. 173.

- Kapadia, K.M.: *Marriage & Family in India*, Bombay, Oxford University Press, 1958.
- Kapur, Promilla: *Marriage & Working Women in India*, Delhi, Vikas Publishing House, 1970.
- —: *The Changing Status of Working Women in India*, Delhi, Vikas Publishing House, 1974.
- Mehta, Rama: *The Western Educated Hindu Women*, Bombay, Asia Publishing House, 1970.
- Nandu, B.R. (ed): *Indian Women: From Pardah to Modernity*, Delhi, Vikas Publishing House, 1976.
- Ross, Aikeen D: *The Hindu Family in its Urban Setting*, Bombay, Oxford University Press, 1961.
- Sengupta, Padmini: *The Story of Women in India*, Bombay, India Book Company, 1973.

LEGAL SERVICES FOR WOMEN

S.P. SATHE

Introduction

'Women' constitute one of the backward social groups in need of special protection. Although nearly half the population of any society consists of women, they have suffered due to long tradition of male domination prevailing almost universally. Tradition, religion and law have conspired to make women subordinate to men. But subordination of women is against the spirit of democracy; it is against equality and justice. Women all over the world have had to struggle for equality with men. They had to fight against unequal laws and for equal opportunities. Even when they secured favourable legislation, they could not get the benefits of such legislation because of various roadblocks to their implementation. Again, the legal system, which means the courts, lawyers, police, bureaucracy etc. continues to be male dominated and therefore the laws have functioned contrary to their declared objectives. The beneficiaries of such laws, i.e., the women, are mostly ignorant about them and tend to accept the inherited lot. In this article, we shall review briefly (i) the laws which have been made with a view to affording equality and justice to women and how in practice these laws have functioned; (ii) judicial and legislative attitude towards women and their rights; and (iii) nature of the legal services that need to be given to women and a model of women's legal services organisations.

I

Laws affording Equality and Justice to Women

The abolition of Sati by Lord Bentinck¹ was doubtless the first

* LL.M., S.J.D. (Northwestern U.S.A.), Pro-vice-chancellor, Poona University, formerly Professor and Principal, ILS Law College, Pune.

1. Bengal Sati Regulation, 1829. See the *Report of the Committee on Status of Women Towards Equality*, p. 102 (Government of India, 1974). Herein after cited as *Report 1974*.

legal measure taken by the British Government for social reform. The British reluctance to legislate social reform is well-known. However, in spite of this, some reforms did come. Legalisation of widow's remarriage, prohibition of child marriage and recognition of widow's property rights were some of the other reforms made during British rule.² The Constitution of India, however, announced unequivocally that in independent India, there would be no discrimination on the ground of sex.³ However, realising the special need for ameliorative efforts to bring about equality between man and woman, it was stated very clearly that the equality provision would not prevent the State from "making any provision for women and children".⁴ The Constitution emphasises the egalitarian thrust when it says that the State shall direct its policy towards securing that the citizens, men and women equally, have the right to an adequate means of livelihood⁵ or that there is equal pay for equal work for men and women⁶ and that the health and strength of workers, men and women, are not abused⁷. The State has also been enjoined to secure just and humane conditions of work and for maternity relief.⁸ A specific mention of maternity relief clearly reveals the anxiety of the Constitution-makers to make it abundantly clear that maternity was a social obligation and woman would not be handicapped because of maternity.

Although the Constitution says so, do women have equal opportunities? True, the Constitution assures them equality in respect of public employment also⁹, and various labour laws provide equality¹⁰ and special facilities such as maternity relief¹¹ and creches¹², but women's employment has not increased signi-

2. The Hindu Widows Remarriage Act, 1856; The Child Marriage Restraint Act, 1929; The Hindu Women's Right to Property Act, 1937.

3. Constitution of India, Preamble, Arts. 15, 16, 325.

4. Art. 15(3).

5. Art. 39(a).

6. Art. 39(a).

7. Art. 39(e).

8. Art. 42.

9. Art. 16.

10. Equal Remuneration Act, 1976.

11. Maternity Benefits Act, 1961.

12. Factories Act, 1948, S. 48.

ficantly. Employers avoid employing women so as to avoid providing for maternity relief or creches. In private sector, their employability is minimal.¹³ Such restricted employment opportunities are bound to tell on women's role in other spheres such as family and society. Most of the social disabilities of women arise from their economic handicaps.

In social field, the Hindu Marriage Act, 1955 took a bold step of abolishing polygamy.¹⁴ Polygamy, however, has not altogether vanished. The incidence of polygamy among Hindus is hardly less than that among Muslims,¹⁵ for whom there is no legal prohibition against polygamy. A Muslim can marry four wives. Women's ignorance of law is exploited in both the communities. Any marriage between two Hindus solemnized after the commencement of the Hindu Marriage Act is void if at the date of the marriage either party has a husband or wife living and the provisions of Sections 494 and 495 of the I.P.C. become applicable.¹⁶ The offences under Sections 494 and 495 are non-cognizable and complaint has to be made by the aggrieved wife or by her father, mother, brother, sister, son or daughter or her father's or mother's brother or sister on her behalf.¹⁷ This seldom happens. The first wife accepts the second wife or her husband out of helplessness. In many cases, women are totally dependent on their husbands for their survival and therefore dare not complain against the husband. Even her relatives do not complain. In many cases, the second marriage is performed without the knowledge of the first wife. Although consent does not validate a bigamous marriage, in some cases, the husband persuades the wife to give consent to his second marriage. Such consent may be given due to undue influence or coercion or due

13. See *Report*, p. 230.

14. Polygamy was already forbidden for Christians [The Indian Christian Marriage Act, 1872, S. 60(2)]; The Parsi Marriage and Divorce Act, 1936, S. 5 forbade Parsis to marry when the spouse was living. The Special Marriage Act forbids polygamy. [S. 4(a) read with S. 24(1)(i) and S. 44.] The Hindu Marriage Act, 1955, Ss. 5(1), 11 and 17. Hereinafter called HMA.

15. See *Report* 1974, p. 108. The 1961 Census pointed out that 5.8 per cent polygamous marriages took place among Hindus, 6.72 per cent among Jains, 7.97 per cent among Buddhists and 5.7 per cent among Muslims.

16. S. 17 of HMA.

17. S. 198(1) read with clause (c) of the proviso.

to ignorance of the law. If the wife is childless, it is a ground for persuading her to give consent because having a child is necessary for a Hindu to continue his family. Sometimes not having a son is a ground for her rejection. But in many cases, women are rejected in spite of bearing children and since getting maintenance through courts is very hazardous, they prefer to tolerate the second marriage of their husbands. The Hindu tradition inculcates in them the habit of obedience to the husband. The husband is God according to Hindu ethics and this still has a great influence on women.

Where such consent is not obtained, as in the case of the middle class or from educated women, a more stealthy way of entering into a second marriage is adopted. Section 7 of the Hindu Marriage Act says that "a Hindu marriage may be solemnized in accordance with the customary rites and ceremonies of either party thereto". Section 11 says that a polygamous marriage is void and Section 17 makes it punishable under Sections 494 and 495 of the I.P.C. However, in order to attract these sections, the marriage between two Hindus must be "solemnized". The word "solemnized" means that ceremonies provided by Section 7 must be performed, and it has been held that a marriage not so solemnized does not result in the commission of the offence of bigamy.¹⁸ Therefore, the man who indulges in polygamy takes care to leave some ritualistic infirmity in either of the marriages.

Professor Derrett had observed that as a result of the above judicial interpretation two types of devices would be used by law evaders: (i) they would deliberately keep either of the marriages defective in form, or (ii) the relations and friends of the second wife would commit perjury and say that the marriage was not properly solemnized.¹⁹ Since criminal prosecution thus becomes difficult, the only remedy available to her is to get divorce.²⁰ This she cannot do because she fears social stigma that is attached to a rejected woman and she is afraid of economic

18. *Bhaurao v. Maharashtra*, AIR 1965 SC 1564. See H.S. Gour: *The Penal Code of India*, p. 3957 (9th Edn., 1980).

19. Derrett: A Round up of Bigamous Marriages, 69 Bom LR p. 84(J) 1967. See *Report*, p. 109.

20. S. 13, HMA.

insecurity. If women were not as insecure economically, there would definitely have been better enforcement of the law against polygamy. Getting maintenance from the courts is not easy. A better remedy would be to prevent the second marriage by obtaining a permanent injunction against the husband from marrying a second wife. Although the Hindu Marriage Act does not contain any provision for granting injunctions against contemplated second marriage, such a suit is not expressly or impliedly barred by any provisions of the Act. According to Kumud Desai, a suit by a Hindu wife for an injunction perpetually restraining her husband from contracting a second marriage falls within Section 9 of the Civil Procedure Code. The Mysore High Court has held that such a suit was permitted by Section 54 of Specific Relief Act, 1877 (now Section 38 of the Specific Relief Act, 1963).²²

Women's most irksome hazard is getting the maintenance. If a woman wants to leave her husband because of his having married another wife or because of his inhuman and cruel treatment to her, she cannot do so unless she has an alternative source of income. Most women are uneducated and therefore not capable of being gainfully employed. The law requires the husband to give maintenance allowance to his rejected wife or to a wife who due to any of the above reasons cannot stay with him.²³ An interim maintenance can be obtained immediately on the starting of the proceedings if it appears to the court that either the wife or the husband, as the case may be, has no independent income sufficient for her or his support and for the necessary expenses of the proceeding. An order for permanent maintenance can be passed at the time of passing the decree of divorce or separation or at any time subsequent thereto on application made to the court for that purpose.

There is another provision in the Criminal Procedure Code for getting maintenance.²⁴ It is a quicker remedy. This remedy

21. Kumud Desai, *Indian Law of Marriage and Divorce*, p. 104 (4th Edn. 1981).

22. *Sankarappa v. Dasamma*, AIR 1964 Mys 247. See *Report*, p. 110.

23. See Ss. 36 and 37 of the Special Marriage Act, 1954; Ss. 24 and 25 of the HMA.

24. S. 125 of the Cr.P.C.

is available not only to the wife against the husband but is also available for minor children, destitute father and mother etc. The amount payable as maintenance under this sections is, however, limited to Rs. 500. However, in practice, getting the maintenance is quite hazardous. The woman has to wait in the court for a number of days and when she gets a decree, she has to shell out money for lawyers' fees and bribes for court employees. What she gets in hand is not much. Even after getting the decree for maintenance, the husband stops paying alimony within a few months and again she has to go through the entire process for getting it. Legal services in this regard being not easily available, she is at a great disadvantage. She is exploited. In many cases, the husband does not show any income. He may not have any income at all. Where he is self-employed, there is no way of knowing his real income. He adopts a number of dilatory and evasive tactics to deny maintenance to the wife as long as possible. There should be a legal services machinery to secure such a benefit to the aggrieved woman.

The question of maintenance is linked up with the question of woman's proprietary position in general. Although a daughter has been given equal share in the property of her father or a wife has been given equal share in the property of her husband, there is a subtle discrimination against women in the prevailing Hindu law. The woman does not become entitled to a share in the joint family property by birth, unlike man. Thus, if there is a father, his wife and four children including three sons and a daughter, the joint property (coparcenary) is divided into five shares, one each of the father and the mother and other three of the three sons. The daughter gets her share only in the property of the father after his death along with the other heirs. Thus out of the whole joint family property each son gets one-fifth plus one-fifth of the father's share whereas the daughter gets only one-fifth of the father's share. The daughter will get equal share with brother from the property of the mother. An impression which generally prevails that woman has equal share with man is therefore erroneous. However, in practice what happens is that even the small share out of the father's property which is due to her is often denied to her. In many cases,

she does not ask for it. She voluntarily gives up her share in favour of her brother/brothers. Further, she has absolutely no share in the self-earned property of her father/husband unless it remains intestate after his death. The father/husband can will away his property. A housewife who had worked for her house for 20 years and had contributed to the development of the house was pennyless if she were to leave her husband. She was married at the age of 17 and after 20 years found that her ways and those of her husband could not meet and therefore they had to part company. The estrangement was merely because she had grown and he had not. She worked in Bombay and earned Rs. 1200 per month. However, if she were to leave her husband, she would have to find separate accommodation for herself, which was next to impossible. What would she do? She must compromise her career and stay with her husband. Because even a most liberal maintenance allowance would not enable her to have a separate accommodation. In the law there is no provision for compelling her husband to share the existing accommodation with her. She has no right over self-earned property of her husband. If she leaves him, she will not have share in the ancestral property too. A Muslim woman is also in an equally helpless condition. She is entitled to maintenance from her husband if the amount of her *meher* is not sufficient for meeting her legitimate expenses.^{24a} This position has however been created by a decision of the Supreme Court. Before that decision she could get nothing over and above the amount of *meher*. In Muslim Law, daughter does not get a share in property equal to that of the son.^{24b} The position is the same even among Parsis.^{24c} The share of the daughter is equal among non-Parsis to whom the Indian Succession Act applies.^{24d}

The tradition which did not provide any inheritance for woman, however, seems to have given birth to the practice of dowry. Dowry means consideration given by the girl's father to

24a. *Bai Tahira v. Ali Hussain Fisalli*, (1979) 2 SCC 316. See generally Jaya Sagade: "Shahabuddin Bill to Starve Muslim Divorcees" in *Secularist*, No. 71, pp. 101-107 (1981); Kusum: "Maintenance of a Divorced Muslim Wife: A Critique of the Proposed Law", 22 JILI 408 (1980).

24b. Fyzee: *Outlines of Muhammadan Law*, p. 393 (4th Edn., 1974).

24c. S. 51(1) of the Indian Succession Act, 1925.

24d. S. 37 of the Indian Succession Act, 1925.

the boy or his father for marrying his daughter. In some communities, the bride price is paid by the husband's side to the wife's father/guardian. It is interesting that while no claims are made to secure woman's rights in the ancestral property, dowry is demanded from the father and the father who is not willing to give her any share in the property does not mind giving dowry. Dowry, unlike *meher*, is not woman's property. It is the worst form of exploitation of womanhood. It makes the daughter a liability to the poor father. The practice of dowry has increased. This could also be traced to increase in ostentatious expenditure and greater flow of black money. Dowry is a symbol of social injustice and is a result of growing disparities of wealth and inflation. Dowry is a reflection of growing social violence and injustice. When capitation fees are paid for securing admissions to medical and engineering colleges, the rate of dowry goes up. Dowry is based on inequality of sexes and inferior status of women. It is not true that women are more than men in number but our tradition has created a feeling that women are in greater need of marriage. Woman's status depends on marriage. If she is married and has her husband living she has a higher social status. If she has children, the status is higher still and if she is mother of sons or a son, she is higher in status than the mother of a daughter. Because of such high value attached to marital status, marriage is a must for women and naturally boys have a higher price. A law prohibiting dowry was passed as early as in 1961 but it so far has had no impact at all. The incidence of dowry is increasing and dowry claimants are now resorting to most inhuman methods like bride burning to secure their aims. Although the Supreme Court has given liberal interpretation to the word "dowry"²⁵, the law is bound to have limited effect. Firstly, taking dowry is a non-cognizable offence and complaint is required to be made by any person who is aware of the commission of the offence. But it is unlikely that any invitee will make a complaint or any near relation of the bride or bridegroom will make a complaint. Even the aggrieved person is not likely to make any complaint since it might jeopardise the future marriage prospects of the girl. In Pune, a case was filed recently in which a wife complain-

25. *L.V. Jadhav v. Shankarrao Abasaheb Pawar*, (1983) 4 SCC 231.

ed that her husband had demanded dowry.²⁶ This is doubtless a brave action but it has been taken by a wife who has already stayed away from her husband. In her case, the complaint is not likely to further prejudice her married life. Some women organisations have asked that dowry-taking might be made a cognizable offence. But there are difficulties in making it a cognizable offence. The offence of dowry is committed between persons having intimate relations and it would be most difficult for an outsider to know that it is committed. It will give rise to police interference in private or domestic affairs. Another loophole in the Act is that the presents in the form of cash, ornaments, clothes and other articles are not to be considered as dowry unless they are made as consideration for the marriage of the said parties. It is impossible to prove that a present was given in consideration for the marriage.

The Joint Committee of both Houses of Parliament was appointed to examine the question of the working of the Dowry Prohibition Act, 1961, and to suggest amendments which could be made in the law. The Committee submitted its report to the Lok Sabha on 11th August 1982. The Committee admitted that there were practically no cases reported under the Act.²⁷ The Committee also admitted that "the evil sought to be done away with by the Act has, on the other hand, increased by leaps and bounds and had assumed grotesque and alarming proportions".²⁸ The Committee ultimately stated that the evil of dowry will not go by passing a law. We will have to undertake extensive public education to bring about social disapproval of that practice. However, even for doing so, a law against dowry will be useful because it helps create public opinion in favour of the social change.

II

Judicial Attitude and Women

All underdogs share one common disadvantage. It is that the existing professional as well as judicial institutions are totally

26. The Indian Express, dt. 22-12-1983.

27. Joint Committee Report, the Gazette of India, Extraordinary, Part II, S. 2, August 11, 1982, No. 42-A, p. 15.

28. *Ibid.* (Ed.: The Dowry Prohibition (Amendment) Act, 1984, No. 63 of 1984 incorporates many recommendations of the Joint Committee).

unrepresented by them. Women are few among lawyers and judges.²⁹ The Supreme Court has as yet no lady judge. There are only a few at the High Courts. In spite of this, barring a few aberrations, the Indian judicial attitude as reflected at the Supreme Court and the High Courts has been favourable and even helpful to social change.³⁰ We shall consider judicial attitude from the following cases: (1) Cases in which discrimination on the basis of sex was opposed; (2) Criminal law cases particularly on rape and murders of wives; and (3) Cases dealing with matrimonial matters.

Equal Protection Cases

In *Muthamma v. Union of India*³¹, the constitutional validity of a government rule which provided that a married woman could be asked to resign from the Indian Foreign Service if the government was satisfied that her family and domestic commitments were likely to come in the way of the due and efficient discharge of her duties as a member of the service, was questioned. A woman member had to obtain permission of the government in writing before her marriage could be solemnized. Another rule said that no married woman shall be entitled as of right to be appointed to the service. Mr. Justice Krishna Iyer observed that "sex prejudice against Indian womanhood pervades the service rules even a third of a century after Freedom".³² He struck down the rule but observed:³³

We do not mean to universalise or dogmatise that men and women are equal in all occupations and all situations and do not exclude the need to pragmatise where the requirements of particular employment, the sensitivities of sex or the peculiarities of societal sectors on the handicaps of either sex may compel selectivity. But save where the differentiation is demonstrable, the rule of equality must govern.

-
29. See Sathe, Kunchur, Kashikar, "Legal Profession: Its Contribution to Social Change — A Survey of the Pune City Bar", 1982 (Mimographed). A summary published in 10 *Indian Bar Review* p. 47 (1983).
 30. *State of Kerala v. Thomas*, (1976) 2 SCC 310. The Supreme Court held that scheduled castes and scheduled tribes were entitled to compensatory discrimination. This, however, has to be contrasted with the Supreme Court's attitude on right to property. See S.P. Sathe: "Supreme Court, Parliament and Constitution" in *Economic and Political Weekly*.
 31. (1979) 4 SCC 260.
 32. *Id.*, p. 260.
 33. *Id.*, p. 262.

In *Air India v. Nargesh Meerza*³⁴, the validity of a rule which required the air hostesses of the Air India International Corporation to continue in service upto 35 years of age or upto her marriage if contracted within 4 years since recruitment or till first pregnancy, was challenged. The court upheld the provision regarding marriage within 4 years as a bar to future service. According to the court, the regulation permitted an air hostess to get married at the age of 23 if she had joined the service at the age of 19 and this was "a sound and salutary provision". The three reasons which Fazal Ali, J. gave in support of the validity of this rule were: (1) it improved the health of the employee; it helped a great deal the promotion and boosting up of our family planning programme; (2) at the age of 20 to 23, an air hostess became fully mature and there was every chance that such a marriage would be a success; and (3) if the bar was removed, the Air India would have to incur huge expenditure on recruiting additional air hostesses either on a temporary or *ad hoc* basis to replace the working air hostesses who conceived. It is submitted that the first two reasons were totally unrelated to the impugned provision. The court was not considering a provision imposing age restriction on marriage in a matrimonial law. It had to examine why such age restriction was valid for air hostesses alone. If marriage at 23 was good for women in general, the provision could be made in the Hindu Marriage Act or the Special Marriage Act or in other relevant law. Why should it be only for the air hostesses? The same may be said regarding family planning. The truth is that the learned judge thought that unless such a provision existed, the Air India would be required to incur expenditure on replacements of air hostesses proceeding on maternity leave. Is this view not similar to the view most of our employers entertain regarding women's employment? If a Supreme Court judge, whose exposure as well as commitment to constitutional values are supposed to be much more than those of any other person, thinks in such terms, how much more would such a prejudice exist among employers who tend to look at things in a purely business manner and from a utilitarian point of view?

These two cases show how the principle of equality between

34. (1981) 4 SCC 335.

the sexes was enforced through judicial process as late as in late seventies and early eighties, and that too with a patronising tinge.

Criminal Cases involving Rape and Violence

Section 375 of the Indian Penal Code defines the offence of rape. If a person commits sexual intercourse with a woman without her consent, or against her will, or with her consent when her consent has been obtained by putting her in fear of death or of hurt, or with her consent, when the man knows that her consent is given because she believes that he is another man to whom she is or believes herself to be lawfully married, or with or without her consent, when she is under sixteen years of age. In rape cases, the victim is so much under social stigma that many rapes are not reported and many end in acquittal. The prosecution has to prove that (1) sexual intercourse took place and (2) that it was without her consent. Since mere penetration is enough for constituting the intercourse, the proof of rape is difficult. The only way is to get the medical examination done of the victim. However, in the case of a married woman, even medical examination is not always conclusive. In order to prove that she did not consent, the prosecution points out the marks of resistance such as torn clothes, injury on private parts, vaginal tears, etc. The law of rape was so loaded in favour of men that to secure conviction against the rapist was well nigh impossible. *Mathura*³⁵ case showed this tellingly. However, in recent years, the Supreme Court has shown greater willingness to believe in the testimony of the rape victim. According to Justice Krishna Iyer:³⁶

What girl would foist a rape charge on a stranger unless a remarkable set of facts or clearest motives were made out? The inherent bashfulness, the innocent naivety and the feminine tendency to conceal the outrage of masculine sexual aggression are factors which are relevant to improbabilise the hypothesis of false implication.

Where a girl below 16 years was raped, the fact that no injury was caused to her private parts and a suggestion that she was used to sexual intercourse was held to be immaterial. Delay in filing the first information report because the family took time to decide

35. See *Tukaram v. State of Maharashtra*, (1979) 2 SCC 143.

36. *Krishan Lal v. State of Haryana*, (1980) 3 SCC 159, 161.

whether to go to court or not also did not matter.³⁷ In another case,³⁸ it was held that if the medical evidence was available, no other corroborating evidence was required if the victim's testimony was otherwise believable. Since the rape victim was a girl of 10 to 12 years of age, her statement was believed.

In *Sheikh Zakir v. State of Bihar*³⁹, Venkataramiah, J. pointed out that normally it was a rule of practice to look for corroboration of the evidence of an accomplice by independent evidence. Although the victim of rape cannot be called an accomplice, the evidence of the victim in a rape case is treated almost like the evidence of an accomplice requiring corroboration. However, "if a conviction is based on the evidence of a prosecutrix without any corroboration, it will not be illegal on that sole ground". In the case of a grown-up and married woman it was always safe to insist on such corroboration. Where corroboration was necessary it should be from an independent source but it was not necessary that every point of the evidence of the victim should be confirmed in every detail by independent evidence. The Supreme Court upheld a conviction of rape even though the woman had taken a bath and washed the clothes and had no medical evidence to support. Since the woman was a married woman who had given birth to four children, there could not have been any injuries on her private parts. The accused was an influential person and the witnesses were not willing to give evidence and the victim and her husband belonged to backward community. They could not have known that they should rush to a doctor for medical examination. The conviction in the case is a good example of sympathetic and understanding judicial attitude. There are doubtless dangers in accepting woman's statement without any corroboration and the learned Judge therefore stated that such corroboration ought to be there. But it could be gathered from the circumstances. The law of rape is also now undergoing legislative amendment.⁴⁰ Cases of murders of women by husbands or in-laws have also been frequent.

37. *Harpal Singh v. State of H.P.*, (1981) 1 SCC 560.

38. *Bharwada Bhoginbhai v. State of Gujarat*, (1983) 3 SCC 217.

39. (1983) 4 SCC 10.

40. Report of the Joint Committee of the Parliament, Gazette of India, Extraordinary, Part II, S. 2, No. 57 — Bill No. 162-B of 1980.

Ed.: See also The Criminal Law (Amendment) Act, 1983 (No. 43 of 1983).

In *Vaswant Narayan Pawar v. State of Maharashtra*⁴¹, the Supreme Court observed that since the instances of wife burning had increased, special police machinery be set up for the prevention and detection of such crime. Further, the court also observed that special provision facilitating easier proof of such special class of murders be made.⁴² The *Nari Samata Manch* of Pune aroused public opinion through picture exhibitions and public demonstrations in two wife murder cases, namely, *Shaila Latkar* and *Manjushri Sarda*. In both the cases, the *Nari Samata Manch* helped the police in their investigation. Both cases have ended in conviction of the accused. Judge Gorwadkar pointed out in *Manjushri* case that where the investigation had been biased in favour of the accused what the judge had to consider was whether a fact existed and this had to be decided on the basis of probability from which a prudent man would draw inference about its existence.⁴³

Matrimonial Cases

Should a woman have freedom to do a job even if it requires to stay away from her husband? Is she bound to stay with her husband and sacrifice the career prospects? The courts have responded differently to such questions. Some High Courts were willing to let her stay away provided she could meet her husband frequently, whereas others held that it would amount to withdrawal from the society of the husband.⁴⁴ Section 9 of the Hindu Marriage Act, 1955 provides for obtaining a decree of restitution of conjugal rights compelling the separated spouse to stay with the other. Unless the spouse shows that the withdrawal is for a reasonable excuse the court grants a decree of restitution of conjugal rights. There are sanctions provided in the Civil Procedure Code for non-obedience of the decree,⁴⁵ which are seldom really invoked. But under the Hindu Marriage Act, non-compliance with the

41. 1980 Supp SCC 194.

42. A bill to that effect was introduced in the Rajya Sabha on the 8th of August 1983. Bill No. XIV of 1983, Gazette of India, Extraordinary, Part II, S. 2, August 8, 1983, No. 23. Earlier there is a provision in the Code of Criminal Procedure providing for enquiries in the matter of suspicious deaths. (See S. 174).

43. Sessions Case No. 203 of 1982, p. 281.

44. See Paras Diwan: "Week-End Marriages and Restitution of Conjugal Rights" in 20 JILI p. 1 (1978).

45. Order XXI, Rules 32 and 33 of the Code of Civil Procedure.

decree is a ground for divorce.⁴⁶ As early as in 1886 *Rakhamabai*⁴⁷ had valiantly fought against a court order asking her to stay with her husband with whom she was married when she was 11 but refused to live on becoming a major. The Bombay High Court speaking through Sargent, C. J. had expressed its helplessness in view of the Hindu Law precepts which treated the marriage of daughters as a religious duty imposed on parents and guardians rather than as a contract between two consenting individuals. In *T. Sareetha v. T. Venkata Subbaiah*⁴⁸, Justice Chaudhary of the A. P. High Court struck down Section 9 of the Hindu Marriage Act as being unconstitutional and void on the ground that it violated personal liberty guaranteed by Article 21 of the Constitution. The learned judge further said that a decree of restitution of conjugal rights constituted "the gravest form of violation of an individual's right to privacy".⁴⁹

This decision is going to have far reaching implications for women's liberty. It has recognized that (i) a woman should be free to decide when and whether to have sex; (ii) a woman should decide whether or not to have pregnancy. If she does not want to stay with her husband, the latter can certainly sue her for divorce. This decision might also lead to the invalidation of a clause of Section 375 of the Indian Penal Code which says that sexual intercourse without consent by a husband with his wife is not rape. This provision permits imposition of sexual intercourse on woman and therefore violates Article 21. It may also be vulnerable under Article 14 of the Constitution.

III

Demands of Women : Nature of the Services and Organisational Infrastructure

We have seen in the above pages that although laws benefiting women have been enacted, most of them have remained

46. S. 13(1-A)(ii).

47. *Dadaji Bhikaji v. Rakhamabai*, 10 ILR Bombay Series 301 (1886).

48. AIR 1983 AP 356.

49. *Id.*, p. 368. A contrary view has been taken by the Delhi High Court on this point in a decision given on November 15, 1983. See generally Kusum : "Restitution Decrees and Divorce", *The Indian Express*, dt. 27-12-1983. (Ed. : See, however, *Saroj Rani v. Sudarshan Kumar*, (1984) 4 SCC 90 in which the Supreme Court held that S. 9 of HMA was not violative of Art. 21).

merely on paper. Polygamy, child marriage, dowry still continue to plague our social behaviour. Dowry in fact has increased and has become a major instrument of oppression. When legislation is enacted for ameliorating the social condition of a depressed class, the existing social framework will also have to change because it is designed to suit the old order. There are vested interests developed in the old order which will not allow an easy implementation of such laws. On the other hand, the beneficiaries of such laws are often unorganised, poor and ignorant about their rights and therefore cannot build up pressure for the implementation of such laws. Since professional legal services are available only on payment, they generally serve the interests of the privileged and maintain the status quo. The legal aid movement is a movement for successful use of law as an instrument of social change and also for bringing about equitable distribution of law as a resource. It must therefore take up the cause of the depressed classes and fight on their behalf for making legal method a success. The failure of the legal method will ultimately set in motion the process of violent overthrow of the existing order. The lawyers who have a stake in preserving the democratic process must therefore contribute to the effort of organising such needed legal services. The legal aid movement in India has been unorganised, diffused and sporadic. There is lack of coordination in it. The lawyers, barring a very few, have not taken much interest in it. There are lawyers who merely pay lip service but do nothing. There are others who are cynical and there are some who are hostile. In spite of these drawbacks, the down-trodden have made some progress. The Supreme Court of India has in recent years shown concern for prisoners, undertrial prisoners, unorganised workers, women and other downtrodden groups. The Supreme Court has given liberal and liberatarian interpretation to constitutional phrases like "procedure established by law".⁵⁰ But much of it became possible because of the favourable responses of some individual judges of the Supreme Court and the High Courts and the efforts of a few lawyers.⁵¹

50. *Maneka Gandhi v. Union of India*, (1978) 1 SCC 248.

51. Marc Galanter has said that all litigational efforts have so far been made by those who were opposed to compensatory discrimination provisions. Never has a matter gone to court to seek

These decisions have come out of the commitment of the individual judges and not because of any systematic legal aid effort. The court has also encouraged public interest litigation and increased access to the courts by entertaining mere letter petitions.⁵² In India, lawyering to the poor has grown in response to such judicial policy making; judicial policy making has not been a result of the legal aid effort. The legal aid efforts still continue to be sporadic and at times motivated by the desire for sensationalism and publicity. One result of such a casual legal aid effort is that no one follows a matter to its logical conclusion. What happened to Mathura?⁵³ What happened to Kamla?⁵⁴ What happened to Pahadiya boys?⁵⁵ Khanjan Mondal's death⁵⁶ reveals the costs in terms of human life which public interest litigation with over-emphasis on mere litigation can cause. Wherever the underprivileged became organised and were resourceful enough to hire legal services, they could improve their position through law. Labour Law is a good example of this.

Legal aid movement should not and cannot concentrate only on litigation strategies. All beneficial legislation — particularly affecting the downtrodden — has a potential for social change

support for it. Marc Galanter: *Compensatory Discrimination* (Oxford). See S.P. Sathe: "Marc Galanter's *Compensatory Discrimination*", (Mimeographed), p. 42.

52. *Tukaram v. State of Maharashtra*, (1983) 4 SCC 10.

53. A tribal girl called Mathura was allegedly raped by two police constables in police custody. The trial judge acquitted the accused, the High Court reversed the trial court's decision and convicted them but on appeal the Supreme Court acquitted them. Four academics, Upendra Baxi, Lotika Sarkar, Raghunath Kelkar and Vasudha Dhagamwar, in an open letter to the Chief Justice pointed out that according to them the Supreme Court decision was wrong and that the judgment reflected a bias against the rape victim. See (1979) 4 SCC (Jour) 17. The matter was extensively commented upon by various newspapers. It was reported that this publicity disturbed the quiet life of Mathura who was otherwise living peacefully with her husband.

54. Kamla was a girl whom famous journalist, Ashwini Sarin, purchased in a flesh market. The Supreme Court ordered her to be kept in Nari Niketan of Delhi. See *India Today*, Vol. 6, No. 10, May 16-31, 1981, p. 83.

55. Dr. Vasudha Dhagamwar brought the plight of the Pahadiya boys who were held in undertrial detention for more than 10 years to the notice of the Supreme Court. The Supreme Court set them free. But after coming out these boys found that life outside was harsher for them than it had been in the jail. See Vasudha Dhagamwar: "Pahadiya File: A Cry in Wilderness" in *Mainstream Annual* 1-6 (1981).

56. Vasudha Dhagamwar: "Why Khanjan Mondal had to Die" in *Indian Express*, 18th September 1983.

and we must concede that social change is too complex a process to be attained only by litigation. Social change will require the following efforts: (1) public education including legal literacy through meetings, press, literature, seminars, workshops, etc; (2) agitational movements with a view to bringing about legal reform through meetings, demonstrations, strikes, bandhs, dharnas etc.; (3) sustained legal aid given to members of such a group against injustice: this will include pre-litigational, paralegal litigational as well as rehabilitational efforts also; (4) public interest litigation, the purpose of which is to obtain a ruling in favour of a class or for a cause. Through such services, the implementation of the social change legislation is accelerated. It is the lack of such an organisation that has made most of the beneficial legislation dysfunctional.

There are a number of women's organisations. Many of them are merely feminine clubs — they have to be feminist. A large number of men as well as women are simply ignorant about laws and unexposed to modern, secular and liberal values. A crash programme of public education including legal literacy will have to be adopted to create a climate favourable to the successful execution of the laws.

Organisations providing such services for the protection of women need not and should not consist only of women. They must consist of men and women. Woman's liberty is to be desired because it is an indispensable attribute of a just society. The issues of weaker sections of society cannot be left to be dealt with only by members of such sections. Gone are the days of individual social reforms such as *Phule*, *Agarkar* or *Karve* in Maharashtra who could crusade for women's equality and liberty. Individual efforts tend to be forgotten soon after the disappearance of the person concerned. We need an organised and institutionalised effort. Therefore, an organisation for women's rights must have men and women who are committed to women's equality and liberty as an essential pre-requisite of social justice. Further, such an organisation must contain a legal cell or must be closely associated with a lawyer's group ready to help. It would be better if there is an integrated organisation for undertaking educational, agitational and legal programmes. These three cannot

be treated in an isolated manner but must form part of an integrated social change effort. The legal component must also not stop after securing a favourable decision from courts. It is not enough that you obtain maintenance for the destitute woman. You must see that she gets it. The follow-up must be done by the legal services organisation. The legal cell will help husbands and wives in every manner — from making effort at reconciliation to obtaining a divorce. It must take up cudgels on behalf of discarded wives and by appropriate legal means prevent the polygamous marriages or take up cases of dowry. One advantage of having such an organisation is that it will have rapport directly with the suffering individuals. An institutionalised legal service would eliminate the class of touts who otherwise exploit the needy litigants and who unfortunately abound our court premises and lawyers' chambers.⁵⁷ A legal service organisation would also eliminate the exploitation of needy persons by unscrupulous and unethical lawyers, whose number also unfortunately is not small. Women's organisations, however, must also aim at providing rehabilitational facilities for destitute women. Many women are abandoned by their husbands — and husbands do not provide maintenance — they do not have resources or claim not to have the resources. Such women must be given work as well as shelter. Women's organisations cannot effectively assert the rights of women unless they have provision of shelter and work for such rebellious or helpless women. Many women end up as prostitutes because of such lack of shelter or work. Rehabilitation should therefore form an important component of women's liberty programme.

Legal Literacy

Women's legal services organisation must deal with problems of wife beating which occur quite frequently. Many a time, such problems cannot be dealt with by law. Real problem is how to bring about education of men and women so as to bring about their exposure to liberal, humanistic values. Women's ignorance is another hazard to be fought against. An educated woman who was in a government service fell in love with another officer and they got married. She was a Hindu and he was

57. See Sathe, Kunchur, Kashikar, *supra*, Note 29.

Christian by faith and they could have been married under the Special Marriage Act. But she was persuaded by him to get converted to Christianity and then marry him under the Christian Marriage Act. Since they could not get along with each other, they separated shortly. They have been living separately for nearly last forty years but have not been divorced because the Indian Divorce Act permits divorce on limited grounds.⁵⁸ Technically, she is still his wife and we advised her to make a will of her property so as to avoid its disposal according to intestate succession. This is an example of widespread legal ignorance which could be fought by massive legal literacy drive. Women must be protected against exploitation by husbands, employers and custodial authorities. Women have to be educated and organised. But even men need to be educated because they have to be convinced that no society can progress when half of its population is in bondage and prevented from fully utilising its potential. Women's emancipation is not only necessary for social justice — it is also necessary for social progress. The legal service organisations must act as Ombudsmen of women. They must educate the society, both men and women, about equality and justice, must prevent acts such as eve-teasing, wifebeating or burning and take legal and other steps against women's harassment in general and against social practices such as polygamy, dowry, etc.

Law Reform

Women's legal service organisations have crusaded these causes and have mobilised public opinion in favour of legal reform. They have also succeeded in bringing about change in legislative as well as judicial attitudes. However, care must be taken by such organisations not to get involved in populist agitations against judicial decisions which they dislike. Such decisions could be changed through intelligent and purposeful lawyering and also by persuasion. Such populist movements in the long run erode the legitimacy of the law and no legal aid movement should contribute to such a development. The organisations

58. Under S. 10 of the Indian Divorce Act, 1869, a wife may obtain divorce on the ground that the husband has changed his religion, or has been guilty of incestuous adultery, or of bigamy with adultery, or of marriage with another woman with adultery or of rape, sodomy or bestiality.

must pursue matters concerning women vigilantly and see that they are properly investigated and adequately presented in the court.

An average woman will get the advantage of the laws only when they are enforced vigilantly. Legal aid has to play a very significant role in achieving this. We have already said what could be done by women's organisations and legal services clinics working together. Law and education will have to work hand in hand. Women's position is in a sense better than the other handicapped sections such as the untouchables. But women of the untouchable section are worst off and their lot is worse than that of the untouchable men in general. It is interesting that even the former untouchables or the *dalits* who struggle for social justice and therefore challenge the existing social order do not extend the liberalism to their womenfolk. In that sense, women are worse off than even the most backward sections of society. The lot of such women is pitiable. Muslim law ought to be reformed with a view to saving Muslim women from polygamy and unilateral divorce. The Christian Marriage Act is also in need of reform. Under the Indian Divorce Act, the wife gets divorce only on certain grounds and they are difficult to prove. Moreover, the grounds available to man are more liberal than those available to women. This provision could be challenged in courts on the ground of discrimination under Articles 14 and 15(1) of the Constitution. Women's organisations must ask for legal reform and ultimately for a uniform civil code.

It is time we organise our legal services so as to make them available to the poor. Women, Scheduled Castes and Scheduled Tribes, minorities, slum dwellers and other poor people have waited enough. They do not need charity. They are asking for the vindication of their rights. If the legal profession, social workers and the State fail to respond to such urges, the existing system of justice will lose its credibility. The State must be bold enough to undertake reform of the justice system with a view to eliminating delays and expensiveness. The system could be deprofessionalised by introduction of tribunals such as family courts which would follow simpler procedures and inquisitorial techniques. The judges as well as lawyers will have to possess greater awareness of their societal obligations.

AN EVALUATION OF DOWRY PROHIBITION LAW

*(With special reference to the Recommendations
of the Joint Committee of the Houses of
Parliament on the Working of Dowry Prohibition
Act of 1961)*

VIRENDRA KUMAR

The prime objective of the seminar on *Social Policy, Law and Protection of Weaker Sections of the Society* is "to assess the role of law as a means of promoting and implementing social policy."¹ This objective is to be realized by specifically considering "(a) the manner in which social policy is formulated and projected by the legislature; (b) how policy goals are interpreted and applied by the courts and officials; (c) the extent to which divergent and conflicting attitudes of individuals and groups affect the implementation of the social policy."²

For the realization of the prime objective, the first thing to take note of is the problem producing social situations. In the instant case, problems relate to the identification of weaker sections of the society, including, amongst others, the women, who are the victims of the oppressive social structure in India. On social considerations, such as those relating to urge for innate human equality and the ones that are supported by altruism, it has been repeatedly realized that women need protection against the overbearing male dominated social structure. Promulgation of a policy for the protection of women is merely a social response to this realization. The working out of this policy,

* LL.M., S.J.D. (Toronto), Professor and Chairman, Department of Laws, Punjab University, Chandigarh.

1. See the opening statement of the "Objectives of the Seminar," as identified in the circulated break-up of the topics of the Seminar.
2. *Ibid.*

however, is a very complex and cumbersome process. More often than not, especially in a social welfare State, such a policy is implemented through the statutory commandments. For instance, for according equality to women with men in matters social and economic, the enactment of the Hindu Codes—Hindu Marriage Act, 1955, Hindu Succession Act, 1956, Hindu Adoptions and Maintenance Act, 1956, Hindu Minority and Guardianship Act, 1956—are usually cited as typical examples. Similarly, for preventing the exploitation of women a law prohibiting the giving and taking of dowry was enacted in the year 1961.

Since the policy enacted through the Dowry Prohibition Act, 1961, did not meet the desired end, a Joint Committee of the Houses of Parliament, after examining the working of the Act, made certain recommendations altering the policy of protection of women as well as the strategy of its implementation. In the present paper, an attempt is made to evaluate the Joint Committee Recommendations both in terms of social policy considerations and their enforcement.

“Dowry” in the legal parlance means the property, called a “portion”, which a woman brings to her husband in marriage. This seems to be an aspect of social mechanism to adjust family relationships. In addition to the gift of their daughter (*kanyadan*), the parents also give to the bridegroom what is termed as *vardakshina*, which, to me, simply symbolises the sense of extreme humility on the part of donor. Unfortunately, in the current demands of dowry, it is this virtue which is being vulgarized, making marriage a commercial transaction. It is the latter aspect which is deadly and disliked in the current notion of dowry. We want to discard the deadly element, without at the same time destroying the desirable one, namely, the gift giving stimulus of the bride's parents for the benefit of the bride sheerly out of love and affection. Attempt is made to achieve this balance in the Dowry Prohibition Act, 1961, by first defining what is prohibited and then excluding from its purview what is permissible. Dowry accordingly is any property or valuable security “given or agreed to be given”, either directly or indirectly, by one party to a marriage to the other party, at, before, or after marriage “as consideration for the

marriage of said parties."³ However, the explanation appended to this definition excludes gifts from the purview of the prohibition if they are given otherwise than as consideration for the marriage.⁴

This enacted social policy is implemented by pronouncing punishment with imprisonment which may extend to six months, or with fine which may extend to five thousand rupees, or with both, not only for those who demand dowry directly or indirectly,⁵ but also for those who give or take or abet the giving or taking of dowry.⁶ Lest the implementation of this social policy should cause undue matrimonial strife, the courts are required to take cognizance of the dowry disputes only after the prior permission of the stipulated officer of the State Government has been duly obtained.⁷

The policy of the Dowry Prohibition Act does not seem to fructify. Dowry demands are made by all and sundry with impunity. According to the *Indian Economic Times*⁸:

The going rates have been the highest for the I.A.S. bridegroom at Rs. 4 lakh. A sellers' market all the time. That the market rate for engineer groom at Rs. 3.5 lakh is slightly above the asking price for doctors may not reflect the actual market conditions, whatever the doctors may diagnose as the reason for the slight fall in their market value. Those with a master's degree may be unemployed. That is neither here nor there. Their tag reads Rs. one lakh which, considering everything, is neither more nor less. Indian B.As. . . . would fetch the tidy sum of Rs. 25, 000. And thus down the scale, matriculates, upper division clerks, etc. . . .

-
3. S. 2. Dower or *mahar* in the case of persons to whom the Muslim Personal Law applies is not included.
 4. This was done by appending an Explanation to S. 2. It is worthwhile to note that the explanation was inserted by the Lok Sabha by amending the Bill as it was presented to it for its consideration by the Joint Committee. However, Rajya Sabha, in their turn, did not accept the said amendment. Consequently, the Bill was considered at the joint sittings of both the Houses of Parliament held on May 6 and 9, 1961, and there the said amendment was eventually accepted.
 5. S. 4.
 6. S. 3.
 7. See proviso to S. 4.
 8. August 16, 1982, p. 5.

The intentions of the groom's parents to get more and more are made known to the bride's parents through appropriate strategies—some subtle and others crude and loud. What is wrong? Is it the formulation of the policy? Is it its implementation? Or, both? Or, something else?

The Joint Committee of the two Houses of Parliament on the working of the Dowry Prohibition Act, 1961, has recommended in its Report the deletion of the words "consideration for the marriage" from the statutory definition of dowry, because "without omitting them the provisions of the Act cannot be made to serve the purposes which they are intended to."^{8a} However, keeping in view the interests of the girls and also to protect the parents of the bride from any undue hardships, the Joint Committee has recommended that, "apart from the right of inheritance or succession or any other property right to which the bride might be entitled to under any other law applicable to her, or any other property rights under any agreement or right of the bride to 'dower' or 'mahar' under the personal law applicable to her, presents made voluntarily, i.e. without compulsion or coercion, either directly or indirectly to her by her parents, relations, friends, etc., at or before or after the marriage in the form of cash, ornaments, clothes or other articles not exceeding in value twenty per cent of the income, during the year preceding the date of marriage, of the parents of the bride or other persons bearing the marriage expenses on the bride's side, or fifteen thousand rupees, whichever is less,⁹ should not be deemed as 'dowry' for the purposes of Section 3"¹⁰ In the view of the Committee, this limit is expected to be within the capacity of the parents and acceptable to the society.¹¹

8a. "Amendments suggested to the Dowry Prohibition Act, 1961," in the Report of the *Joint Committee of both the Houses of Parliament on the Working of the Dowry Prohibition Act, 1961* (Lok Sabha Secretariat, New Delhi, August, 1982), Para 3.4, at pp. 50-51. (Hereinafter simply cited as *Report on Dowry*). See also Dowry Prohibition (Amendment) Act, 1984 Ed.

9. Shrimati Promila Dandavate, member of Lok Sabha, in her minute of dissent, reduced this limit to ten per cent of the annual income or rupees ten thousand, whichever is less. See, *id.*, Chapter IV, at p. 73(b).

10. *Id.*, Para 3.5, at p. 52. This recommended ceiling does not seem to include the presents made voluntarily to the bride by the bridegroom or parents or relations of the bridegroom, *ibid.*

11. *Id.*, para 3.5 at pp. 52-53.

The deletion of the words has been recommended because "it is well nigh impossible to prove that any property or valuable security given or the presents so made were as 'consideration for the marriage'" ¹² Once the aggrieved parents of the bride have not to prove this, in the opinion of the Committee they would not be "reluctant and unwilling to set the law in motion." ¹³ In our submission, however, so far as this objective is in view, the desired deletion would not make any difference, because, for setting the machinery of law in motion, it still remains incumbent upon the aggrieved parents to prove that they were obliged to give the said security or property under "compulsion or coercion." If under the existing provision, the parents, in the interest of their daughter, would be reluctant to say whether the property or valuable security in question was being given as 'consideration for the marriage', they would continue to do so, I guess with still greater reluctance, where compulsion or coercion has been exercised. Why? Obviously because the statement regarding compulsion or coercion is certainly more explosive than the statement regarding 'consideration'. Moreover, anything shelled out under compulsion or coercion would itself amount to 'given as consideration for the marriage', whereas the converse might not always be true.

A few comments regarding the recommended ceiling of 20 per cent of the annual income or Rs. 15,000 (whichever is less) are also in order here. First, if the benefit of dowry given to the daughter by her parents were to accrue to her alone, there is hardly a need of putting any ceiling. What is required is that all that property should be listed and registered in her name, ¹³ and this should be done, I submit, right in the first instance when the presents are made to her. Such a step, taken initially, would obviate the necessity of effecting cumbersome subsequent transfers; for example, in the case of divorce as envisaged by the Joint Committee, ¹⁴ or in a situation contemplated

12. *Id.*, para 3.4, at pp. 50-51.

13. *Id.*, para 3.4, at p. 51.

13a. *Id.*, para 3.6, at p. 53.

14. *Ibid.*

by Section 6 of the Dowry Prohibition Act, 1961.¹⁵ However, it would indeed be an added protection to the married women if it could be ensured that their property is not to be allowed to be transferred or disposed of either by her husband or her in-laws without the prior permission of the court (hopefully, the Family Court) on an application made by her.¹⁶ Secondly, if the bridegroom or his parents were also to share the benefit, albeit indirectly through the bride, the recommended limit, in our view, is unrealistic. If the prospect of more money is the main consideration in the marriage, the bridegroom and his parents would still be looking for the bride whose parents' annual income is minimum to the tune of Rs. 1,00,000—an income 20 percent of which yields Rs. 15,000.¹⁷ That alone is perhaps not enough. The so-called law abiding adventurous bridegroom and his parents are also likely to make sure that such family has either only one daughter to marry, or the annual turnover of their income increases commensurate to the number of daughters they have. To put it arithmetically, if the family has two daughters, the expected annual income should be at least at the level of Rs. 200,000; if three, then Rs. 300,000, and so on and so forth. Mind you, the matrimonial advertisements are already in vogue, stipulating that "only status families need apply." The Dowry Prohibition Act, if the Joint Committee's recommended limit is incorporated, would only make the term "status", I believe, more articulate: "Status families" means and includes families whose current annual income is minimum at the rate of Rs. 100,000

15. Under Section 6 of the Dowry Prohibition Act, 1961 when any dowry is received by any person other than the woman in connection with whose marriage it is given, that person is obliged to transfer it to the woman within a period of one year from the stipulated date. In case she dies before receiving it, her heirs are entitled to claim the same from the person holding it for the time being, see S. 6(3). The Joint Committee has recommended that in no case her heirs should include her husband and that if she dies under suspicious circumstances and the property is inherited by her minor issues, such property should be looked after by the guardian appointed by the court till they attain the age of majority, see *Report of Dowry*, *supra* Note 8, para 3.23, at p. 62.

16. *Cf. Report on Dowry*, para 3.6, at p. 53, wherein the Joint Committee has put in the restriction only for a period of first five years of marriage.

17. The ceiling of 20 per cent of the annual income of the bride's parents or Rs. 15,000 is further pushed up to 30 per cent or Rs. 20,000 if in it are included the value of the permissible presents to be made to the bridegroom or his family members, and also the expenses to be incurred on betrothal and marriage ceremonies. See, *id.*, paras 3.7, 3.8 and 3.9, at pp. 54-55.

per daughter. This is likely to be qualified by the statement (following the 'statutory warning' printed on the cigarette packet): This lower limit is laid down to comply with the 'statutory standard'. According to the prevailing practice, this statement would be followed by the concluding sentence within brackets: "This advertisement is only to have wider selection."

The other unrealistic aspect of the ceiling is that, barring aside the salaried people, in majority of cases it is even difficult to know their actual annual income. How many people in India file their income tax returns? And how many of them file it correctly? Thus, whether the property passed in marriage is of the value of not more than 20 per cent of the annual income is rather imaginary than real.

The mode of limiting dowry under the Sind Deti-Leti Act, 1939,¹⁸ seems more realistic. It prohibited payments in excess of limits specified in the list applying to the family on girl's side.¹⁹ The lists were to be drawn either by the respective *Panchayats*,²⁰ or, failing which, by the Provincial Government, in the prescribed manner,²¹ and within a given period. Such lists when registered and published were to be binding upon every member of the Panchayat so long as he continued to be such member and upon every member of his family dependent on him.²²

The list-approach of the Sind Act is commendable. Through the requirement that the lists were to be prepared by the

18. Act No. XXI of 1939. (Hereinafter cited as Sind Act).

19. *Id.*, S. 4(1).

20. Explanation appended to S. 6 of the Sind Act defines Panchayat as any combination or body of persons consisting of not less than fifty adult male members.

21. It is stipulated under Section 5 of the Sind Act as amended by Section 5 of the Sind Act I of 1940, that the list shall contain particulars of the nature and number of the maximum payments authorised thereunder and of the occasion on which and the persons to or by whom such payments shall be made provided that the aggregate value of such payments did not exceed the statutory maximum.

22. See S. 6 of the Sind Act, as amended by Act I of 1940. S. 7, however, categorised those persons to whom the list made by the Provincial Government applied. They were the persons who were members of a panchayat, but their panchayat had omitted to make the list in the prescribed manner.

respective *panchayats* containing particulars of the nature as well as number of the maximum payments authorised thereunder and the occasions on which such payments should be made, the State could enlist a very valuable support of the society to solve the problem, which is essentially a social, and not a legal, problem. Any violation of the list would constitute a transgression of the norms, which are indeed 'the norms *of* the community, *by* the community and *for* the community'. When the acts of the individual members of the community are measured with the community's own standard, representing the community's collective sense of justice, the individuals are more likely to conform to that standard rather than deviating from it. This is specially true in a relatively close-knit society, as we have in India, where the fear of alienation of affection of the community is an effective restraining factor. In this perspective the computation of what is given as dowry by the girl's parents on the basis of their own personal annual income (in pursuance of the Joint Committee's recommendation) would represent, in my submission, an individualised approach as against the community's or collective approach. The latter is certainly better than the former both in terms of identification and enforcement — identification of the deviating members; and, through the pressure of public opinion, dissuading them from such deviations.

Hitherto, the problem of dowry has been sought to be resolved by prohibiting the practice of its both 'giving' and 'taking'. However, in accordance with the Joint Committee's recommendation, it is only those who take or abet the taking of dowry who should be punished;²³ the giver of the dowry should not be subjected to any punishment even as an abettor.²⁴ The reasons given for the recommendation are these.²⁵

The giver of dowry is more a victim than a criminal. The parents do not give dowry out of their free will but are compelled to do so. . . . (W)hen both the giver and taker are punishable, no giver can be expected to come forward to make a complaint.

A couple of implications flowing from these supporting reasons

23. See *Report on Dowry, op. cit.*, para 3.12, at p. 56.

24. *Ibid.*

25. *Id.*, para 3.11, at p. 56.

are examined here. One is that dowry is always given out of fear and force, and not out of love and affection, whatever be its limit, is not true. Had it been so, perhaps we would not have hitherto made the distinction between what is given as 'consideration for the marriage' and what is not so given, between what is given out of compulsion and what is given out of love and affection. Moreover, in the whole scheme of the Dowry Prohibition Act, even when it proposes to limit dowry, the person to whom should accrue the main benefit is the bride herself. And if the bride herself were to be the chief beneficiary of the dowry, she would naturally be the eventual taker of the dowry. In that case, certainly it is not anybody's argument that punishment is to be directed against her.

So far as the bridegroom is concerned, we would again be in error to think that dowry is always given to him under compulsion. One may, very often, come across concrete cases (instances are many if matrimonial columns are any index of prevailing social realities), wherein the promise of 'decent marriage' in the background of 'rich industrialist family', 'having the only daughter amongst several sons' is held out. What is of such 'givers', who generally belong to the monied middle-upper and upper-upper classes? Although giving dowry is not their problem, yet, through their ostentation, such givers do create a social problem for the persons usually belonging to the upper-middle and lower-upper classes. Understandably so. Even the persons who, in the scale of money belong to the upper-lower and lower-middle classes also become the victims of such 'affluent givers'.²⁶ Should we call such 'givers' as 'victims' or 'criminals'? Shouldn't such 'givers' be subjected to any punishment as abettors?

Another reason for excluding the 'givers from the purview of punishment is said to be to make the Dowry Prohibition Act workable. It is hoped that the 'givers' should be able to come forward to make a complaint,²⁷ and thus set in motion the

26. They hardly wield any significant influence over the rural masses, tribal groups, urban slum-dwellers or daily wage-earners.

27. *Report on Dowry, op. cit.*, para 3.11, at p. 56.

machinery of the State for punishing the 'taker'. Once the much desired deterrent punishment is provided,²⁸ the evils of dowry would soon vanish. In our view, this is too simple a solution to solve a complex social problem.

For the purposes of the present analysis, all dowry cases we may broadly divide into two categories. One, the cases in which the problem is precipitated before the marriage has been contracted or solemnized. Of this category, there are hardly any reported cases. Only once in a while one does come across newspaper report stating that owing to disagreement on dowry, 'bridegroom returned without the bride'. No follow-up even in such cases has been noticed, perhaps for good reasons. The dowry dispute incident might have been construed, and well construed in our submission, as ominous of future disaster. Coming events, as they say, do cast their shadow before.

Majority of the cases relating to dowry disputes, however, fall in the other category, where the dowry problem arises *after* the marriage. Let us think of a case wherein the conflict problem is precipitated by the persistent demands for dowry by the husband or his parents from the parents of the wife. Caught in this situation, the wife's parents, more often than not, shell out the desired dowry. They do so, it needs to be emphasized, even at the cost of incriminating themselves. Why? Simply because they wish their daughter to live in amity with her husband. Thus, it is not the non-culpability of the 'givers' (as the Joint Committee seems to suggest), which would make them instantly 'complainants' under the Act, but the paramount interest of their daughter. And the daughter's interest is not served by putting her husband or husband's parents behind the prison bars, much less than inflicting upon him or them a deterrent punishment. A criminal law approach, in my submission, is not conducive to construe the problems of matrimony. "The cynical colour of criminality. . . is

28. According to the Joint Committee, a punishment to be deterrent must be a punishment of imprisonment for a minimum period of six months extendable upto two years and a fine extendable upto ten thousand rupees or an amount equivalent to the amount taken as dowry, whichever is more. Any lesser punishment would be inflicted only exceptionally for adequate and special reasons in deserving cases. See, *id.*, para 3.12 at p. 56.

bound to eat the vitals of (the) institution (of marriage),” said a perceptive judge.²⁹

The Joint Committee in its Report seems to conclude that, “inadequacy” of punishment under the Act is one of the principal factors that has made it “ineffective”.³⁰ Accordingly, in addition to making the offences under the Act ‘cognizable’³¹ stiffer punishments have been recommended by the Committee on various counts. For example, denial of conjugal rights on the ground that dowry has not been given or that dowry is insufficient should be made punishable with imprisonment extendable upto one year or fine extendable upto ten thousand rupees.³² Similarly, it is recommended by the Committee that if the person holding the property does not return it within three months, he should be punishable with imprisonment for a minimum period of six months extendable upto two years or with fine upto ten thousand rupees or with both.³³ Likewise, severe punishment has been suggested for those who take or abet the taking of dowry,³⁴ and separate deterrent punishment for those who demand dowry.³⁵ All these are attempts which unmistakably suggest that the dowry prohibition law should be made more and more coercive. But this explicit faith in the coercive character of law for the resolution of the problem, which is primarily and essentially a social one, is, in our view, highly misplaced.

However, this coercive character seems to be counteracted when it is realized that, “dowry offences, being of a delicate nature, should not be tried by ordinary courts.”³⁶ Accordingly,

29. *Per* M.M. Punchhi, J., in his order of reference in *Vinod Kumar v. State of Punjab*, 1982 Hindu LR 327, 328.

30. *Report on Dowry, op. cit.*, para 3.14, at p. 57.

31. ‘Cognizable offence’ means an offence for which a police officer may arrest a person without warrant. The Joint Committee, however, seems to give its own version of the cognizable offence. While recommending the offences under the Act as cognizable, they have been made subject to the condition that no arrest shall be made by the police officer without a warrant or an order of a magistrate, see *id.*, para 3.30, at p. 65. In our view, this recommendation is only in name, not in effect.

32. *Id.*, para 3.19, at p. 60

33. *Id.*, para 3.22, at p. 62.

34. *Id.*, para 3.12, at p. 56.

35. *Id.*, para 3.15, at p. 58.

36. *Id.*, para 3.25, at p. 63.

it is recommended by the Committee that "Family Courts should be established to deal with family matters including the offences arising out of the violation of the Dowry Prohibition Act."³⁷ These special courts, on the model of courts in foreign countries such as in the U.S.A., Japan and Australia, would have the assistance of specialists like sociologists, psychologists and social workers in considering any particular family problem.³⁸

But this approach of the special Courts, which is essentially diagnostic in nature, is nullified substantially by the deterrent punishment loaded substantive provisions of the dowry prohibition law. A deterrent punishment, at best, might overcome the *effects*, but it cares little about their *causes*. For example, if there is a case of denial of conjugal rights by the husband allegedly on the ground of insufficient dowry, I wonder if any amount of punishment inflicted upon the husband³⁹ could make him worthy of husband-wife relationship. The matters of inter-personal intimate relationship such as that of husband and wife, let this social fact be grasped fully, are matters to be regulated from within and not without. And here is the important role for the Family Courts to play. Equipped with the assistance of specialists, a Family Court judge would be enabled as if to look into the conflict problem from 'within', rather than merely from 'without'.

Even in the realm of criminal law, increasingly it is being realized that any viable cure of criminality is not conviction. Reformatory theory of criminal justice is, therefore, gradually gaining ground. Pursuant to this relatively new approach, we are already attempting to convert our jails into *Sudharghars*. Why should we, then, if I may say so, 'criminalise' the dowry problem whose *causa causans* is not in criminality? In my judgment, little purpose would be served by creating the cadre of the Dowry Prohibition Officers, whose chief function under the Act is "to collect evidence for the effective prosecution of persons" contravening its provisions.⁴⁰ They would simply be another class of

37. *Ibid.*

38. *Ibid.* Details about setting up family courts are already at the formulating stage. This was so declared by the Law Minister in the Rajya Sabha on August 9, 1982. See *The Tribune*, August 10, 1982. (Ed.: Now see Family Courts Act, 1984, No. 66 of 1984).

39. See *supra* note 32, and the accompanying text.

40. *Report on Dowry, op. cit.*, para 3.33, at p. 66.

police officers. Indeed, it is the recommendation of the Joint Committee that the envisaged Dowry Prohibition Officers should be invested with such powers of a police officer as the government might deem necessary for the purposes of the Act.⁴¹ Like the police, they would naturally be concerned, not catching up the causes but solely with the keeping of public order. This role is hardly adequate to deal with dowry dilemma.

Very recently, to test the validity of the force of traditional inertia, I happened to suggest to my students in the classroom discussion, seemingly in light vein, a very simple solution to the dowry problem. "Let us reverse the prototype pattern," I said. "Let the bridegroom (not the bride) on his marriage become the member of the bride's parents family and experiment with it, say, for two decades in the first instance!" To overcome the awkward situation in which unmistakably I found my students, I said, "I love to try this prescription myself. . . In fact, I am already trying it. It is proving extremely useful. . . ." Spontaneous reactions to my suggestion were still in the negative, not only of boys but girls also. To them such a suggestion simply amounted to 'the reversal of reason'. There is not much difficulty in construing boys' reaction. The reaction of the girls, however, should be a cause of concern. In the popular literature, such a reaction is often interpreted as "Woman: her own worst enemy." "It is the woman who is ultimately responsible for handing down the prejudices against women from one generation to another. . . . The woman in the role of a mother has been prejudicing her son's mind against the daughter-in-law and preparing a long list of expectations from his wife, including the birth of sons; the woman in the role of a wife has been joining hands with her husband in crying over the birth of a daughter, and the woman in the role of a daughter has been feeling inadequate without dowry. . . . So it is a tragic flaw in women's character which yields the suicidal tendencies. . . ."

All this is being enacted, and this needs to be perceived carefully, within the well entrenched family structure of the society, which is basically patriarchal, patrilocal and patrilineal. Through the tinkering here and there in the laws of succession,

41. *Ibid.*

inheritance, adoption, maintenance and guardianship, we are pinning our exclusive faith in the coercive character of law, we are trying to be innovative. But innovation is not reform. We need reform and not innovation. Only then the prejudices embedded in the social matrix are likely to be removed. And the dowry problem would be dissolved *ipso facto*.

Alongside the formulation and enactment of 'de-criminalized' social policy, the judges, who are to interpret and apply the law are in dire need of comprehending its social policy considerations. Without comprehension, any policy may fail to fructify. Perhaps, it is for this inherent proximity between the formulation and the implementation of social policy, that the executive government is made only out of the larger legislative body. Likewise, the judiciary entrusted with the duty of decreeing execution is not without creative power. For dispensation of justice, therefore, the position of a judge partakes that of a legislature — both in terms of articulation and implementation. A judge would fail to execute and promote social policy if he did not comprehend the very reasons of its enactment in law.

Let me show how the lack of comprehension leads to the frustration of social policy. The case in view is that of Mr. L.V. Jadhav, who filed a criminal case under the provisions of the Dowry Prohibition Act against the husband of his daughter. His complaint was that the man in question and his father, when the marriage ceremony was in progress, demanded a cash amount of Rs. 50,000 under the pretext that this amount was required for the passage of the couple to the U.S.A. where the man (bridegroom) was working as an engineer. This demand was persisted by the father of the husband. The Judicial Magistrate, after verifying the complaint, issued processes against both the named persons. These proceedings were, however, quashed by the Division Bench of the Bombay High Court.⁴² The reason adduced by the court is this. Section 4 (which makes demanding dowry punishable with imprisonment or fine or both) read with Section 2 (which defines dowry as any property given or agreed to be given as consideration for the marriage) envisage a 'demand' for a

42. *Shankarrao Abasaheb Pawar v. L.V. Jadhav*, (1983) II DMC 31, per Gadgil and Kotwal, JJ.

property which was agreed to be given as consideration for the marriage,⁴³ and not simply a "unilateral demand."⁴⁴ Since in the instant case it was not the plea of the complainant that he had agreed to pay Rs. 50,000 and that very agreed amount was demanded by the accused, no offence was, therefore, held to be committed under Section 4 of the Act.

This interpretation that mere demand for property as consideration for the marriage would not constitute a demand for dowry (and therefore no offence committed under Section 4) tends to destroy the dominant purpose of the Act — the purpose being to discourage the demands for property as consideration for the marriage.

Leila Seth, J. of the Delhi High Court was encountered with the Division Bench decision of the Bombay High Court in *Lajpat Rai Sehgal* case (1983).⁴⁵ The perceptive judge perused the Bombay judgment by first distinguishing "a demand of an agreement to deliver certain property as a consideration of the marriage" from "a mere demand for certain property as consideration of the marriage without there being any prior agreement to meet that demand."⁴⁶ The Bombay decision, she said, was on the latter count, leaving "specifically" the question open on the first.⁴⁷ Without commenting upon the invidious character of the distinction as such, she held that in the light of the facts of the Delhi case, the Bombay decision did not appear to be relevant in as much as the complaint in the former case clearly indicated that property or valuable security was in fact demanded by the accused, and the bride's father did comply at least partly with those demands.⁴⁸ From the acts of "demands" and consequential "compliance" thereof, there was no difficulty in inferring "that there was some agreement in the matter."⁴⁹

43. *Id.*, para 11, pp. 35, 36.

44. *Id.*, para 9, at p. 35.

45. *Lajpat Rai Sehgal v. State*, (1983) 1 DMC 301 (Delhi) per Leila Seth, J. (para 49, p. 311).

46. *Id.*, para 53, p. 312.

47. *Ibid.*

48. *Id.*, para 54, p. 312.

49. *Id.*, para 55, p. 312.

But is there any need for introducing the element of "compliance" or for responding favourably to undue demands into the social policy of prohibiting dowry? Social realities would bear out that demands are often made not in terms of any prior agreements, but quite independently of them. In fact, it is the brazen act of demanding, one may add without agreement, which make any property or valuable security given in marriage *tainted* with "consideration for marriage." In other words, anything that is given voluntarily does not become "a consideration for marriage", and, as such, saved from the taint of illegality under the explanation appended to Section 2. Indeed, there is no logic either in law or in life for propounding that a complainant must incriminate himself or herself by complying with brazen demands of the accused before he or she could successfully impeach him.

Thanks to the persistent efforts of Mr. L.V. Jadhav, the original complainant, who moved the summit court by special leave against the holding of the Bombay High Court, discarding the view of the High Court, the Supreme Court observed :

... There is no warrant for taking the view that the initial demand for giving of property or valuable security would not constitute an offence and that an offence would take place only when the demand was made again after the party on whom the demand was made agreed to comply with it. . .⁵⁰

For augmenting the "dominant object of the Act, which is to stamp out the practice of demanding dowry in any shape or form, either before or after the marriage,"⁵¹ the summit court did not hesitate censuring the move of the High Court for restraining the magistrate from issuing processes to the accused :

The High Court, we cannot refrain from observing, might well have refused to invoke its inherent powers at the very threshold in order to quash the proceedings, for these powers are meant to be exercised sparingly and with circumspection when there is a reason to believe that the

50. *L.V. Jadhav v. Shankarrao Abasaheb Pawar*, (1983) II DMC 242 (SC) per S. Murtaza Fazal Ali, A. Varadarajan, M.P. Thakkar, JJ. (para 8, pp. 248-49).

51. *Id.*, para 8, p. 248.

process of law is being misused to harass a citizen. The present was not such a case. . . .⁵²

To this extent, the summit court seems to comprehend and carry forward the social policy of the enacted law.

However, on the question what constitutes "consideration" for marriage within the meaning of Section 2 of the Act, the Supreme Court appears to be irresolute and hesitant. This is reflected in the course of approving the construction of the term "consideration" placed by the Delhi High Court in *Inder Sain* case.⁵³ The Delhi Court, on this count, concluded:

Thus the definition of the 'consideration' leads to the conclusion that the property or valuable security should be demanded or given whether in the past, present or future for bringing out solemnization of marriage. After the marriage, giving a property or valuable security by the parents of the bride cannot constitute a 'consideration' for the marriage unless it was agreed at the time of or before the marriage that such property or valuable security would be given in future.⁵⁴

The Supreme Court holds this view as 'right', albeit with regret, because it has hastened to add: "It is desirable that even such a demand should be prohibited and made punishable in law."⁵⁵

Once the "dominant object of the Act" is clear, "which is," to quote the Supreme Court itself, "to stamp out the practice of demanding dowry in any shape or form, whether before or *after the marriage*,"⁵⁶ there does not seem any rationale for restricting the scope of the expression "as consideration for the marriage" to "as consideration for the solemnization of marriage." In fact, in most cases dowry is demanded not before or at the time of marriage, but after the marriage.

If the goals of social policy are clear, language of the law enacting that policy unambiguous, and societal voice loud and clear, what is then needed for implementation is the clear

52. *Id.*, para 8, p. 249.

53. *Inder Sain v. State*, (1981) II DMC 110, per Luthra, J.

54. *Ibid.*

55. *Supra*, note 50, para 6, p. 246.

56. *Id.*, para 8, p. 248 (emphasis added).

comprehension of that policy — a comprehension with conviction. That alone will enable our judges to be constructive and self-reliant. Then instead of merely saying remorsefully “that it is desirable that even such a demand should be prohibited and made punishable by law,” our lawmen at the summit court would themselves be able to decipher and determine the desirable direction. For taking a technical or restricted view there might be some restraints on the judges of the lower courts or even of the High Courts, because in the hierarchy of judicial system they are obsessed by the feeling of ‘being bound’ by the decision of the Supreme Court. But there should be none of that sort for the judges of the summit court whose declaration of the law shall be binding on all the courts in India.⁵⁷ For them the feeling of being bound by *reason of authority* should become rarified and eventually replaced by the feeling of being bound by the *authority of reason*.

57. See Article 141 of the Indian Constitution.

DOWRY SYSTEM IN INDIA : A SOCIO-LEGAL ANALYSIS

SUDESH KUMAR SILARMA

In Encyclopaedia Britannica dowry is defined as a term denoting the "property, whether realty or personal, that a wife brings to her husband on marriage."¹ Similarly, Encyclopaedia Americana defines dowry as "the property that the bride's family gives to the groom or his family upon marriage."² Dowry is thus the property which the husband receives from his wife and her family upon marriage. However, in modern law dowry has been given an extended meaning. It is defined as something given or taken in consideration of marriage and thus if the *bridewallas* also receive money it will be dowry.

Giving or taking of a girl or boy in marriage in consideration of property is utterly undesirable, uncalled for and unjustified under the legal system founded on the bedrock of equality before law and equal protection of laws.³ It is also against the declared policy of distributive justice conceived by the framers of the Constitution as the unending craze for the well placed bridegrooms and their allurements through the command of money make the parents of the bride languish in distress and poverty.⁴ This goes against the goal of a socialistic pattern of society because the ostentatious behaviour of the upper middle class and upper classes tend to influence other socio-economic groups adversely. It is an undeniable fact that, excepting a few rich, all have to spend beyond their means where dowry is involved.

* LL.M. (Delhi), Ph.D. (Punjab), Lecturer, Faculty of Law, University of Jammu.

1. 7 *Encyclopaedia Britannica* 619 (1970).

2. 9 *Encyclopaedia Americana* 321 (1969).

3. See Art. 14 of the Constitution of India.

4. See Preamble and Art. 38.

Dowry also denigrates the status of the women in spite of the fact that the Constitution prohibits any kind of discrimination on the basis of sex except the one to protect the interest of the weaker sex.⁵ The evil of dowry has caused injustices to the Indian womanhood by destroying the equality of sexes, the peace and sanctity of matrimonial homes and by forcing several newly married brides to commit suicide. It has become so deeply ingrained in our society that if one wants to vouchsafe justice and dignity of women, one has to devise new modalities and strategies for its eradication. Several attempts have been made since 1950 to abolish the evil of dowry in India.⁶ Even in the Hindu Code Bill it was provided :

Money paid or property transferred in consideration of a person's consenting to the marriage was to be held by the transferee as property in trust for the bride, to be transferred to her at the age of 18 or to her heirs if she died before attaining that age.⁷

According to Derrett, "this was an attempt to abolish the dowry system or at least to modify its worst evils."⁸ Finally, the Parliament passed the Dowry Prohibition Act, 1961 to prohibit the evil of dowry throughout the country. Despite these efforts, the pernicious evil of dowry still persists with its contagiums in the Indian society. With this backdrop an attempt is made in this paper to study the socio-legal implications of the dowry system in India from the perspective of distributive justice to women and measures necessary for its eradication. The study includes the

5. See Art. 15(1) and 15(3).

6. See the Andhra Pradesh Dowry (Prohibition) Act, 1958; the Bihar Dowry Restraint Act, 1950; the Jammu and Kashmir Dowry Prohibition Act, 1960. These were legislations at the State level. The Parliament passed the Central Dowry Prohibition Act, 1961 to prohibit the evil of dowry throughout the country except the State of Jammu and Kashmir. The Central Act repealed the Andhra Pradesh Dowry Prohibition Act, 1958 and the Bihar Dowry Restraint Act, 1950 vide its Section 10. So far the Central Act has not been made applicable to the State of Jammu and Kashmir. The Joint Committee in its report has recommended that the Central Act should be extended to the State of Jammu & Kashmir also. See *Report of the Joint Committee of the Houses to examine the Question of the Working of Dowry Prohibition Act, 1961*, Chapter III, Part II, pp. 72-73, (Mimeograph), dt. 6 August, 1982.

7. J. D. M. Derrett : *Hindu Law : Past and Present*, p. 63 (1957). See Clause 93 of Hindu Code Bill.

8. *Ibid.*

following aspects :

- I. Origin and growth of 'dowry' ;
- II. Dowry as a social evil ;
- III. An appraisal of the provisions of the Dowry Prohibition Act, 1961 ; and
- IV. Appraisal and suggestions.

I. Origin and Growth of Dowry

In ancient India dowry was never an impediment in the discharge of a daughter's marriage. The status of woman in that society was like a chattel, a commodity that could be sold and purchased easily without any hindrance. A husband used to make a payment to his father-in-law, and a wife was often in effect bought from her father.⁹ The payment of bride's price was in lieu of her services which she used to render her family, and on marriage as her family was to be deprived of her services so the price was a compensation to her parents. Thus the question of demanding dowry by the husband could never be thought of during these days and if ever the demand was made, it would have been dismissed as preposterous. The wife had no proprietary rights in her husband's family. Similarly, her father-in-law had not to provide an expensive education to her husband. Thus the evil of dowry as it is found today could never appear on the surface in primitive societies.

However, in ancient India there was a tradition in the rich and royal families to give some gifts to their sons-in-law at the time of marriage. These gifts used to be voluntary and purely out of love and affection.¹⁰ In *Smritis*, there is no mention of dowry, i.e., the contract of payment made by bride's

9. See *supra* note 1. *Encyclopaedia Britannica* reads: "In many primitive societies husbands make a payment to their fathers-in-law and a wife is often bought from her father." Such forms of marriages are still practised in hilly areas of our country. See G. L. Gupta: "The Evil of Dowry and the Present Laws," *Lawyer*, pp. 35-40 (1977).

10. See A. S. Altekar: *The Position of Women in Hindu Civilization*, p. 70 (1978). The *Atharvaveda* once incidentally refers to royal brides bringing with them the dowry of a hundred cows. *Draupdi*, *Subhadra* and *Uttara* also brought with them rich presents of horses, elephants and jewels at the time when they left their parents' homes after their marriages. In *Raguvansa* (VII, 32), the king of Vidarbha sent handsome presents with his sister *Indumati* at the time of her departure with her husband after her marriage.

father with the bridegroom or his guardian. Had there been such a custom, it would have been denounced by the *Smritikars* like the counter custom of bride's price. *Smritis*, however, recommended that the bride should be given in marriage along with suitable ornaments, but their number and price was left to the discretion and paying capacity of bride's father. Thus, our ancients were extremely zealous to safeguard the status of women; anything which prejudiced her status in the society was looked down upon.

The origin of dowry system can, however, be traced to the conception of marriage as a *dana* or gift. Daughter's marriage was a religious gift, so it was usually accompanied by a gift in cash or gold known as *Varadakshina* given by the parents or guardian of the bride to the bridegroom. This *Varadakshina* or dowry in those days included ornaments or clothes, which the parents of the bride could afford and were given away as the property of the bride.¹¹ The amount of *Varadakshina* along with *Kanayadana* was nominal and was offered out of affection and did not constitute any kind of compulsion for marriage. It was voluntary without any coercive overtones.¹²

But in medieval times in Rajputana, the dowry system assumed alarming proportions among royal families and had become a positive evil of great magnitude from 13th or 14th century A. D.¹³ Dowry, thus, owes its origin to the royal classes, for whom it was more a matter of prestige and self-honour. The unearned wealth which accrued to the big landlords enhanced their prestige because it signified their natural superiority over working classes. The landlord class mostly amassed the surpluses of entire economy and thus could afford to defend the sexual division of labour within the family where the status of women was that of an amputated human being. According to Nalini Singh:

Perhaps it is here that the privatisation of women took place, and they became somebody's property, 'inside persons'. Women's only acceptable role in these classes

11. *Supra*, note 6, Report of Joint Committee, Chapter I, Para 1. 1.

12. *Ibid.*

13. *Supra*, note 10, p. 71.

became the biological, and the 'homemakers'. Idle women became synonymous with the ruling classes.¹⁴

Amongst the royal classes, women became non-economic entities, the 'inside persons' truncated indeed with no participation in the socio-political life of the society. By excluding the women from public life, the royal classes maintained that they could remove half of their population from direct economic activity (even supervisory work) and still prosper because of their absolute wealth. Secondly, they could protect their family lineage by limiting their women's contacts with the outsiders and thus ensure a pure race. Amongst the ruling classes, the marriage became an institution with territorial, defence and political functions. In *Encyclopaedia Britannica* it is noted that the institution of dowry:

(H)as played an important part in building the power and wealth of great families and even in determining the frontiers and policies of States. The importance of the dowry in the framing of dynastic policies is epitomized by the epigram *Alla bella gerunt tu felix Austria nube* (Others wage wars: You happy Austria, get married); and the practice of preferring marriage to wars of conquest was not confined to Austria.¹⁵

In India such a practice of marriage in preference to war was very common. In marriages amongst the big chiefs dowry was an element of wider alliance of wealth and power. A daughter's marriage used to be an occasion for the transfer of material resources from one clan chief to another, because this transfer of resources commemorated appropriately her zero economic status and at the same time strengthened the relations amongst the chiefs. It was also an occasion to display one's willed waste of resources (such as extravaganza of hospitality to the *barrat*), which was an acknowledged symbol of status and royalty. But in ordinary families the amount of dowry was only a nominal one, and moreover, voluntary. Thus it presented no impediment in the settlement of a daughter's marriage till the middle of 19th century. It is only during the last 50 or 60 years that the amount of the dowry has begun to assume scandalous proportions. A

14. Nalini Singh: "Why Dowry Spells Death", *Express Magazine*, Chandigarh, November 1, 1981, p. 4.

15. *Supra*, note 1, p. 619.

good education, a lucrative appointment, or a good footing in a learned profession has improved enormously the social and economic position of a youth, and made him immensely attractive as a son-in-law. He has naturally acquired a high price in the marriage market. There were no such factors in the pre-British period, when society was mostly agricultural and government appointments were not so lucrative as they are at present. So naturally, anything like the present scandalous dowry system did not exist.¹⁶

Besides these, the most probable factors that might have influenced the growth of the institution of dowry according to Mr. Jagan Mohan Rao are :

- (i) Joint family system ;
- (ii) Social and religious pressure on the people to get their daughters married as early as possible ;
- (iii) Incidence and encouragement of early arranged marriages ;
- (iv) Influence of caste element and the practice of hypergamous marriages ;
- (v) Attitude of the people to regard dowry giving and taking as a matter of status and social prestige ; and, last but not the least ;
- (vi) The growth of women population outnumbering men and thus enlarging the number of potential brides for every prospective bridegroom.¹⁷

It is submitted that these factors have considerably influenced the growth of dowry in the present society.

II. Dowry as a Social Evil

Dowry has become the most dangerous social evil these days. It has created problems for people from all walks of life, the rich and the poor alike. It has affected the persons of all the religions, the Hindus, Muslims,¹⁸ Sikhs, Christians and the Parsis,

16. *Supra*, note 10, p. 71.

17. R. Jaganmohan Rao : "Dowry System in India — A Socio-Legal Approach to the Problem", 15 JILI 617, 618-19 (1973).

18. In Bihar dowry is replacing 'Mahar' and is accepted by Muslims. In Karnataka, the 'Jeda' (dowry) is demanded by the parents of the bridegroom and it is gradually replacing *mahar*.

etc. In this way, dowry has become a national evil, a veritable curse vitiating and undermining the family peace, harmony and growth.

The evil of dowry has ruined number of families and has been the reason for many unhappy homes. Many brides out of sheer frustration are driven to commit suicide because of unbearable torture and trauma of their in-laws. It is necessary to find out why the law enforcement authorities and the society in general see the physical violence resorted to by a man and his relatives against the wife who fails to bring the expected dowry, as less repugnant than other variants of criminal assaults. While murder in general is universally condemned and often results in the murderer being punished adequately, but that of a wife by her husband does not invite similar social condemnation or retribution.¹⁹ Another consequence of the evil of dowry is the development of sex delinquency among the girls whose parents are unable to get them married at the proper age, and it leads to prostitution. The Committee on the Status of Women found that the incidence of prostitution is on the increase. Many girls have to undertake this trade just to earn enough for dowry for their marriages. In Calcutta alone the number in the profession is about 10,000, a substantial number of them are educated women. In Tehri Garhwal where poor parents have

19. The Supreme Court has directed the Commissioner of Delhi Police to supply it the number of incidents of unnatural dowry deaths of women by burning in the Union Territory during the period 1979-81. Court has also sought details of progress of criminal prosecutions in cases in which chargesheets had been filed and reasons where no chargesheet had been filed. This all came out of a petition filed by Mrs. Kapila Hingorani, Advocate, on behalf of victims of dowry deaths in over 19 cases. See *The Indian Express*, Chandigarh, Saturday, February 6, 1982. According to official figures, cases of wife burning increased from 670 in 1975 to 1675 in 1979. These figures do not include cases of suicides by newly married women. Out of the total number of cases of wife burning tragedies reported in 1979, 744 were from Uttar Pradesh, 364 from Maharashtra and 249 from Andhra Pradesh. There were 143 cases in Delhi, 98 in Rajasthan, 48 in West Bengal, 23 in Punjab and 2 cases each were reported from Tamil Nadu and Karnataka. In most of these cases, the parties involved were unwilling to invoke the provisions of the Dowry Prohibition Act, 1961.

See *Report of the Joint Committee*, Chapter II, para (2), p. 13. Delhi's record is formidable. In 1977 women's death due to burns was recorded at 311; in 1982 the number had shot upto 810. See Anjali Deshpande: "Can she be saved?" *Mainstream*, July 16, 1983, p. 27.

hardly any money to spend on the marriages of their daughters, they send them to Delhi, Meerut and other adjoining areas to earn money. A survey conducted by the National Academy of Administration, Mussoorie reveals that *Pruallon* block near Dehradun is another area badly afflicted by this. A single village in Uttar Kashi received nearly Rs. 3 lakhs a month from the earnings of their women.²⁰

Dowry demands also lead to child marriages. As it is not possible to predict what a child will be, thus chances of heavy demand for dowry are less.

Dowry demands have also led to the increase in divorce cases. Nearly 20,000 of such cases are recorded every year.²¹ A divorced innocent woman in Indian society is the worst sufferer as it jeopardises her status for no fault of hers.

Marriage has lost the sanctity of a sacrament. The wedding ceremony has been reduced to a big business in which the bridegroom's father tries to make as much money as possible. The rates of dowry vary from caste to caste and in each caste from boy to boy depending upon his accomplishments, family status and other attainments. If the groom is educated, it varies according to the academic degrees he has obtained. If he is employed, the post that he holds determines the dowry. In some cases, a settlement of dowry takes place before the marriage and parents of the girl bear his educational expenses either in the country or even abroad, and when the boy returns home, many a time he breaks the promise and marries the girl of his own choice. Dowry has financial repercussions on the capacity of the payer, sometimes reducing him to economic bankruptcy. Where parents are rich, they have no problem; rather they are prepared to pay higher price than the demand of the opposite party if they find a suitable match for the marriage of their daughter. The rich parents unnecessarily exhibit the show of their wealth by decorations and arranging feasts to countless persons. Such occasions affect the middle and poor people in the neighbourhood. They also want to have similar shows in their homes on marriage

20. See R. C. Aggarwal: "The Crusade Against Dowry", *XXIII Social Welfare* 7, 8 (April, 1976).

21. *Ibid.*

occasions and while settling marriages, they forget their position and quote the instances of neighbourhood. Demands are also made likewise. This results in the economic exploitation of the poor in achieving false social prestige and status. Thus the dowry is taken less out of greed than out of unquestioning conformity, and the need to live up to one's neighbours. A media campaign combined with educational insights could more effectively counter such a thinking than mere legal measures.

Some parents are forced to take dowry for their sons to provide for their daughters. Many justify taking of dowry on the ground that it provides economic security to newly married couple. It helps the husband to discharge the responsibilities he assumes on marriage. It can be argued that it is nothing but a gift of love and affection by the bride's father who is not obliged to give any share to his daughter by birth. However, there is a change in law and girls are equally entitled to right of inheritance under the Hindu Succession Act, 1956. The Joint Committee is of the opinion that this has unintentionally contributed to the evils of the dowry system as the prospective in-laws, instead of claiming the share of their daughter-in-law in her father's property after the marriage prefer to demand the same in the form of dowry in marriage.^{21a} In fact, no father is prompted to give dowry as a gift of love and affection; rather, he is forced to give dowry to induce the boy to marry his daughter.

Thus, there is no evidence to suggest that dowry is a voluntary gift, a symbol of filial affection for a daughter who is leaving the home of her parents on marriage. However, there is every evidence to show that it is a *nazrana*, a unilateral transfer of resources by a girl's family at her marriage to the groom's family in recognition of the latter's generosity in inviting an amputated human being to their home permanently.²² Nalini Singh summarises this hypothesis thus:

Society perceives woman as economically less productive than man (or unproductive) and, therefore, a female is regarded as a net economic drain on a family. At marriage, when the female is in transit between the two households, the

21a. See *supra*, note 6, *Report of the Joint Committee*, p. 5.

22. *Supra*, note 14 p. 1.

family that accepts her is perceived to be saddled with a net economic liability, while the household that is losing her is in fact losing a liability. Dowry is, therefore, a compensatory payment to the family which agrees to shelter her, hypothetically for the rest of her life. And precisely for this reason, dowry is a recurring phenomena which lasts a lifetime.²³

She has further observed :

Dowry is a clear affirmation of the fact that one's gender determines one's worth or significance. Since worth is distributed unequally amongst the sexes at birth, worth-deficiency amongst females can be offset by material additives. Dowry is the most prominent additive. In the survey of the cases of unnatural deaths of young women, this hypothesis suggested itself again and again. Brides who earn more than their husbands are made to feel an obligation to supply 'dowry goods and services' long after their marriage, just as those women who earn nothing.²⁴

It is contented by some that if women are made economically independent, the evil of dowry will disappear. It is submitted that this is not a solution, but only an alternative. Economic independence is not the same thing as equality. The problem of dowry is a problem of the equality of sexes. Her right to equality and freedom is usurped by the male, so the primary thing is to awaken women. In freedom and equality lies their emancipation. Clearly the dowry system is based neither on equality nor on justice or equity. It is a manifestation of men's exploitation and enslavement of women.

Mahatma Gandhi, the greatest social reformer and sincere well-wisher of humanity, condemned this system. He considered it heartless and wanted that marriage must cease to be a matter of arrangement made by parents for money. He desired that this system must go. The system of dowry was intimately connected with caste. So he advised the people to break the bonds of caste and go for inter-caste marriages.²⁵

23. *Id.*, p. 4.

24. *Ibid.*

25. See *Harijan*, 23rd May, 1936. Quoted by R. K. Sharma in *Nationalism, Social Reform and Indian Women*, p. 244 (1979).

Rai Sahib Harbilas Sarda presiding over the Lahore Session of National Social Conference on 26th and 27th December, 1929 observed :

So long as the caste system exists, we must permit and, at times, encourage intercaste marriages. Some communities are so small that it is not possible to find within their fold suitable matches for boys and girls. Intercaste marriages upto a certain extent are sanctioned by *Shastras* and they are now recognised by law. With such marriages becoming more frequent, the evils of prices being paid sometimes for bridegrooms and sometimes for brides will disappear. This pernicious practice has ruined many homes and has occasioned many suicides. Reform in this direction is urgently called for.²⁶

Thus the efforts should be made in the direction of encouraging intercaste marriages, and that will go a long way in mitigating the evil of dowry system.

An important question which needs to be considered is whether dowry concerns only those who can afford to give it. Consequently, for 70 per cent of India's population which is poor, the dowry should not be a problem, but it is not so; the dowry has today impregnated the walls of every house and has become the essential part of every marriage. There is, in fact, no difference these days in the pattern and motives of conspicuous consumption and dowry, either religionwise, regionwise or otherwise.²⁷ Dowry has come down through ages and will continue always in some form or the other. There are few studies on the motivations and compulsions of dowry, a theme which needs to be studied elaborately.

The Dowry Prohibition Act came into operation on 1st July, 1961. The Act saves the institution of dowry or '*mahar*' in the case of persons to whom Muslim personal law applies.²⁸ Sections 3 and 4 of the Act declare it to be an offence to give, take or demand dowry; the abetment of giving or taking of dowry

26. *Id.*, p. 230. See also K. K. Datta: *Renaissance, Nationalism and Social Changes in Modern India*, p. 213 (1965).

27. *Supra*, note 6. See the *Report of the Joint Committee*, p. 32.

28. See S. 2(b).

is also an offence under these sections.²⁹ The object of Section 4 is to discourage the very demand for property or valuable security as consideration for a marriage between the parties thereto. It prohibits the demand for 'giving' property as valuable security which demand if satisfied would constitute an offence under Section 3 read with Section 2 of the Act. Hence, consent for meeting the demand is not necessary to constitute an offence under Section 4 of the Act.^{29a}

According to Section 2, dowry means and includes any property or valuable security given or agreed upon to be given, between the parties concerned or by any person to any other person at, before or after the marriage as a "consideration" for the marriage.³⁰ The term consideration is not defined in the Act. The definition clause clearly prohibits giving or taking of dowry in any form whether in cash or kind, by either of the party, or by either of the party's parents or by any other person, directly or indirectly, at the time of marriage or before or after the marriage, if it is given or taken as a consideration for the marriage, but not otherwise. Section 2

29. Section 3 provides :

If any person . . . gives or takes or abets the giving or taking of dowry, he shall be punished with imprisonment which may extend to six months, or with fine which may extend to five thousand rupees or with both.

Section 4 stipulates :

If any person, . . . demands, directly or indirectly, from the parents or guardians of a bride or bridegroom, as the case may be, any dowry, he shall be punishable with imprisonment which may extend to six months, or with fine which may extend to five thousand rupees or with both.

29a. See *L. V. Jadhav v. Shankara*, (1983) 4 SCC 231 : AIR 1983 SC 1219.

30. Section 2 of the Act reads :

Dowry means any property or valuable security given or agreed to be given either directly or indirectly—

(a) by one party to a marriage to the other party to the marriage;
or

(b) by the parents of either part to a marriage or by any other person, to either party to the marriage or to any other person : at or before or after the marriage as consideration for the marriage of the said parties (Ed. : See, however, Section 2 of the Dowry Prohibition (Amendment) Act, 1984).

Explanation I to Section 2 reads :

Any presents made at the time of marriage to either party to the marriage in the form of cash, ornaments, clothes or other articles, shall not be deemed to be dowry within the meaning of this section, unless they are made as consideration for the marriage of the said parties. (Ed. : Omitted by the Amendment Act, 1984).

clearly suggests that payment of anything to the bride by way of bride's price is also prohibited under the Act, and any agreement to pay dowry is illegal and void. Explanation I to Section 2 makes it clear that any present or gift made at the time of marriage to either party by any person in the form of money, or ornaments, clothes or any other articles are excluded from the purview of this section. This means giving or taking of gifts or presents in any form, cash or kind, at the time of marriage is permitted. The only thing that has to be satisfied under the Act is that it is not given or taken as a consideration for the marriage. One can, thus, manage dowry as a gift given out of love and affection and go unpunished. Lack of clear explanation of the terms 'consideration', 'gift' and 'presents' in Section 2 makes the giving and taking of dowry difficult to prove.

Professor Derrett while discussing the phrase "consideration for the marriage" is of the opinion that "a present or payment is in consideration for the marriage if the marriage would not have been arranged for those who arranged it unless the present or payment had been made or promised to be made".³¹ He also suggests that the definition of *Sulkam* in Anglo-Hindu Law can be utilized for the purpose and *Sulkam* is now understood to mean property paid to the parents of the bride to induce them to give her in marriage.³² Thus, he concludes that the phrase "consideration for the marriage" should be construed as property passed to the parents of the bridegroom to induce them to accept the bride in marriage. It is submitted that this interpretation has limited meaning. It should be interpreted to include any demand made to the girl or her family at any time before, at or after marriage for the continuance of marriage. It should also be seen whether the giving of property or presents is voluntary out of free will and affection or dowry is extorted as a consideration for the marriage or for its continuance.

In *Inder Sain v. State*³³, Delhi High Court took a strange view that the demand of articles made and met after the marriage did not constitute dowry. This case arose out of the proceedings

31. See Derrett: *Introduction to Modern Hindu Law*, p. 146 (1963).

32. *Ibid.*

33. *Marriage Law Journal*, Vol. IV, p. 421 (1981): 1981 Cri LJ 1116 (Delhi) (per Luthra, J.).

initiated against the petitioner along with three others in the court of Metropolitan Magistrate, New Delhi under Sections 3 and 4 of the Dowry Prohibition Act, 1961 on the complaint of Smt. Meera, the wife of the nephew of the petitioner Inder Sain. She was maltreated and harassed by her in-laws so that she could bring more dowry in spite of the fact that number of dowry demands had already been met by her parents. Petitioners moved the High Court under Section 402, Criminal Procedure Code contending that the offence of giving or taking dowry was complete as soon as the marriage took place, and therefore, the demands made subsequently did not constitute dowry and hence the proceedings initiated against them could not sustain. Accepting their plea the court observed that the offence of demand and giving of dowry was complete as soon as the marriage took place. The giving of property or valuable security by the parents of the bride after the marriage cannot constitute a "consideration" for marriage unless it was agreed at the time of or before the marriage that such property or valuable security will be given in future. The court said articles given after the marriage with a view to have "smooth sailing and continuance of good marital relations"³⁴, did not constitute any consideration or reward or motive for marriage. This judgment is not a good law. It is submitted that the obligations of the father-in-law mostly increase after marriage and these include gifts on the birth of the child and other celebrations and occasions subsequent in the family of the son-in-law, and the so-called presents and gifts made on these occasions should be treated as dowry.

There are also unrecognised and unwritten premarital contracts in our society such as "staying" (*Thaka* or *Tika*) of the boy after both the parental sides have agreed to the union. This is tantamount to 'reservation' of the boy for the girl and on this occasion money and property passes from the girl's to the boy's side. In case the boy's side chooses to break the contract probably no legal liability arises, except that it affects the reputation of boy's family as they are dubbed for their 'unreliability', 'greed' etc. making it difficult for them to find another girl. To save their face, the boy's family sometimes launches a campaign of

34. *Id.*, Cri LJ p. 1119.

calumny against the girl and her family. It is submitted that such a reservation of groom should be treated as a special revocable contract between the parties and the terms on which such a contract can be entered into, procedure for revocation, determination of damages, prevention of unjust enrichment of the boy's side should also be clearly defined by law.

Law should also regulate the "*sagai*" or "*shagun*" ceremony. This takes place few days before the marriage and it should be treated as a contract. It is an announcement of the engagement of the boy and girl. Again some money and property passes from the girl's side to the boy's side. It is submitted that the same kind of legal safeguards as mentioned above should be provided for its breach.

Persons violating Section 2 can only be prosecuted with the prior sanction of the State government.³⁵ This is a formality which destroys the very objective of the statute. The government of West Bengal have, however, provided that no such previous sanction is necessary for taking cognizance of an offence on a complaint made by an organisation for social welfare as may be specified by the State government. Such a provision should be incorporated in the Central Act.^{35a} A salutary provision in the Act is Section 6 which requires the return or retention of the amount of dowry by the receiver for the benefit of the bride or her heirs. It shall not be used by the groom's father either for himself or for the use of anybody else other than the bride or her heirs.³⁶

35. See Ss. 4 and 8 of the Act.

35. See Ss. 2 and 8 of the Act.

35a. See proviso to S. 4, the Dowry Prohibition (West Bengal Amendment) Act, 1975.

36. Section 6 reads:

(1) Where any dowry is received by any person other than the woman in connection with whose marriage it is given, that person shall transfer it to the woman,

(a) if the dowry was received before marriage, within one year after the date of marriage; or

(b) if the dowry was received at the time of or after the marriage, within one year after the date of its receipt; or

(c) if the dowry was received when the woman was a minor within one year after she has attained the age of eighteen years: and pending such transfer, shall hold it in trust for the benefit of the woman.

(2) If any person fails to transfer any property as required by sub-section (1) and within the time limited therefor, he shall be punished—

It means that pending such transfer the dowry forms a trust in the hands of the person holding it and he is answerable as a trustee. There is also a penalty attached to the non-transfer, and if the woman dies before the transfer the dowry enures to the benefit of her heirs.

One is surprised why such a provision has not received the attention it deserves of the campaigners against dowry? Mr. G.R. Rajagopaul has explained very aptly the auxiology of this section in the following words :

This weapon is not as blunt as appears to be assumed. In fact, Parliament then thought of this provision as the best approach to this subject. Let us consider its practical implications. Assume that dowry has been given and taken; assume that no prosecution is possible because no one is willing to go to court; assume that the woman is being subjected to constant harassment even long after marriage for further dowry. Can the woman not use this as a powerful weapon to bring the concerned party to his sense? The party holding the dowry would in most cases be the parent for the husband and if he does not hand it over to the woman as required by law he would be acting in breach of trust with the necessary consequences. And where the husband also takes up a hostile attitude it is obvious that the marriage has not been a success. The woman could easily walk out of such a marriage and force the party holding the dowry, be it the husband or any other person, to cough up the ill-gotten gain.³⁷

It will not be out of place to discuss some cases where the courts took the view that the dowry articles constitute trust in the hands of the in-laws and should be returned to the bride within one year from the date of marriage.

In *Saibaba v. Mangatayary*³⁸, the groom agreed to marry the bride for an amount of rupees eight thousand and five hundred.

ble with imprisonment which may extend to six months or with fine which may extend to five thousand rupees or with both but such punishment shall not absolve the person from his obligation to transfer the property as required by sub-section (1).

(3) Where the woman entitled to any property under sub-section (1) dies before receiving it, the heirs of the woman shall be entitled to claim it from the person holding it for the time being. (Ed. : See also the Amendment Act, 1984).

37. G. R. Rajagopaul : "Dowry and the Law", AIR 1983 Journal 49, 51.

38. 1978 Cri LJ 1362 (AP).

It was paid to the groom's father in two instalments before marriage. According to the provision of Section 6 of the Act, the amount should have been returned to her within one year from the date of the marriage. Since the failure on the part of groom and his father to do so made them guilty of an offence under that section, the girl filed a complaint about it on her first marriage anniversary. The prosecution so started eventually took the case to the High Court of Andhra Pradesh, where it was contended by the counsel of the offenders, ironically a lady advocate, that the proceedings were time-barred, and were entertained by a court having no jurisdiction to do so. She further argued that the money was taken by the groom's father and hence the groom could not be held liable to return it. The High Court dismissed the petition and observed :

- (i) though the amount was received by the groom's father, since it was in consideration of marriage, both were guilty under the Act;
- (ii) the prosecution was for the offence of not returning the dowry to the woman under Section 6 (and not for taking dowry); hence, the period of one year mentioned in section would run from the date by which it should have been returned i.e., the first anniversary of marriage, not the date of marriage;
- (iii) the dowry has to be returned to the woman; since this has to be done where the woman lives, the court in that place has the jurisdiction to try the case.³⁹

Recently in *Vinod Kumar v. State of Punjab*⁴⁰, a number of cases were registered with the police on the complaints of the wives alleging that at the time of marriage substantial dowry was given to them by their parents which was entrusted to their husbands and parents-in-law. The wives alleged that they were maltreated and turned out of the homes as they could not fulfil the demands being made for more dowry. On being turned out, the wives demanded the return of the dowry articles which the husbands and parents-in-law refused. The accused were charged under Sections 405 and 406 of the Indian Penal Code thus raising an

39. *Id.*, pp. 1364-65.

40. AIR 1982 P&H 372 (FB).

important question of law whether refusal to return dowry to wife amounts to criminal breach of trust under Sections 405 and 406 of Indian Penal Code. It is submitted that some part of *dowry from the time immemorial* constitutes wife's '*Istridhana*'⁴¹ which is her exclusive property and thus the husband has no right to retain it.

The full bench of Punjab and Haryana High Court speaking through S.S. Sandhawalia, C.J. held :

From times immemorial Hindu Law has recognized the individual ownership of the wife with regard to the aforementioned articles of dowry and traditional presents given at the time of wedding. Continued recognition of this fact and the individual ownership of the Hindu wife with regard thereto is manifest from the well settled rule that the *stridhana* cannot be attached with for the debts of her husband. Equally well-acknowledged is it that the husband has no right of alienation to that which is the *stridhana* of his wife. These facets highlight the clearcut recognition by the oldest treatises of the Hindu Law with regard to individual ownership of her separate property by a Hindu wife. It is, therefore, wholly idle to contend today that articles of dowry and traditional presents given at the time of the wedding cannot be the individual property of a Hindu wife.⁴²

According to Professor Diwan :

When dowry is in fact given or taken, marriage is valid and it is the bride who is entitled to it. The person receiving the dowry is obliged to transfer it, under the pain of punishment, to the bride. If the bride dies before receiving it, her

41. See Mulla : *Principles of Hindu Law*, pp. 158-59 (1970) (S. T. Desai ed.). According to Manu, '*Istridhana*' includes the following :

- (1) Gifts made before the nuptial fire, explained by Katyayana to mean gift made at the time of marriage before the fire which is the witness of the nuptial (*adhyagni*).
- (2) Gifts made at the bridal procession, that is, says Katyayana, while the bride is being led from the residence of her parents to that of her husband (*adhyanahanika*).
- (3) Gifts made in token of love, that is, says Katyayana, those made through affection by her father-in-law and mother-in-law (*pritudatta*), and those made at the time of her making obeisance at the feet of elders (*Padavendnika*).
- (4) Gifts made by father.
- (5) Gifts made by mother.
- (6) Gifts made by a brother.

According to commentators, this list is not an exhaustive enumeration of '*Istridhana*'.

42. *Supra* note 40 at 384.

heirs are entitled to claim it from the person holding it. The dowry does not, however, vest in the bride, though she has the power to assign it.⁴³

Also in the case of *Bhai Sher Jang Singh v. Varinder Kaur*⁴⁴, Punjab and Haryana High Court has held that in respect of '*Istridhana*' whether given by gift or will, wife was the absolute owner and could deal with that in any manner she liked. Section 27 of the Hindu Marriage Act and Section 14 of the Hindu Succession Act, the court said, 'had not in any way modified the concept of '*Istridhana*'. Indeed, the resultant effect of such enactments was to put the Hindu female wholly at par with the Hindu male, if not at a higher pedestal with regard to individual ownership of the property. However, in *Surinder Mohan v. Kiran Saini*⁴⁵, the same court had taken a view that no claim could be made on the basis of *Istridhana* as it had been completely abolished by Section 27 of the Hindu Marriage Act which made it joint property of the parties. It is submitted that *Surinder Mohan* is not good law and it was so held in *Bhai Sher Jang* and in the latter the complaint was held to be maintainable under Section 406 of the Indian Penal Code. But the court had failed to follow *Bhai Sher Jang* in *Vinod Kumar v. State of Punjab*⁴⁶, wherein speaking for the court, S.S. Sandhawalia C.J. observed :

The very concept of the matrimonial home connotes a jointness of possession and custody by the spouses even with regard to the movable properties exclusively owned by each of them. It is, therefore, inept in view of the conjugal relationship as involving any entrustment or passing of dominion over property day-to-day by the husband to the wife or *vice-versa*. Consequently, barring a special written agreement to the contrary, no question of any entrustment or dominion over property would normally arise during coverture or its imminent break-up. Therefore, the very essential prerequisites and the core ingredients of the offence under Section 406 of the Penal Code would be lacking in a charge of criminal breach of trust of property by one spouse against the other.⁴⁷

It is submitted that this aspect of the judgment appears to be

43. Paras Diwan : *Modern Hindu Law*, p. 79 (1979).

44. *Marriage Law Journal* 570 (1979) : 1979 Cri LJ 493.

45. *Marriage Law Journal* 212 (1977).

46. *Supra*, note 40.

47. *Id.*, p. 394.

wrong one. Perhaps, the court seems to be swayed by the technicalities contained in Section 406 of the Indian Penal Code. Wife is held to be entitled to her dowry articles, but if the husband retains them dishonestly, he is not liable. This is preposterous and smacks of distributive justice eroding the separate entity of a wife.

It is submitted that if the wife has been deserted and forcibly turned out of the house, she must be held entitled to her dowry articles and in case the husband retains them unlawfully he must be held criminally liable. There is thus an urgent need of declaring such property in the hands of bridegroom and others as in trust for the bride and they should be held liable for the offence of criminal breach of trust if they fail to return to the bride on a demand made by her.

Section 7 states that the cognizance of offence can only be taken either by the court of a Presidency Magistrate or a magistrate of first class if the parties complain within one year of the offence. It is submitted that the period of filing the complaint should be extended to three years as has been done by the government of West Bengal in its Amendment Act.^{47a} Moreover, as both the giver and taker are liable, it deters the aggrieved party from entering into litigation. It is equally futile to expect even the aggrieved party to set the law in motion since the bride's parents who are usually the victims would be reluctant and unwilling to make a complaint because of the fear that their daughter could be victimised for that. The Act defeats its purpose by expecting a third party aware of the commission of the offence and actuated by social conscience, to set the legal ball rolling. It is very rare that the third party will spend his or her valuable time and money in litigation to secure conviction. Unless a third party comes in there will be no case and no punishment.⁴⁸ In *Darshan Singh v. State of Punjab*⁴⁹, it was held that a court cannot take cognizance under Section 4 of the Dowry

47a. See S. 7(b) of Dowry Prohibition (W. B. Amendment) Act, 1975.

48. See Minutes of Dissent of Sinhasan Singh and Uttamrao Patil on the *Report of Joint Committee*, the Gazette of India, Extraordinary, Part II, S. 2, 1191/7-13, dt. November 19, 1959.

49. 1979 PLR 252.

Prohibition Act, 1961 as amended by the Dowry Prohibition (Punjab Amendment) Act, 1976, *i.e.* on a police report if no complaint is filed by the aggrieved person or on his behalf. The perusal of Section 7(2),⁵⁰ including its both provisos, shows that only the aggrieved person and some other person on his or her behalf as mentioned therein can file a complaint under Section 4 of the Act, but no such complaint can be filed by a police officer on behalf of any of them.

Section 8 makes every offence under this Act non-cognizable, bailable and non-compoundable.

The Governments of Himachal Pradesh and Punjab have made the offences cognizable, bailable and non-compoundable, whereas the government of Bihar have made them cognizable and non-compoundable. It will be good if Central Act is also made stringent in its provisions so that every offence under the Act may be made cognizable and non-bailable, but it would be better if the offences under the Act are made compoundable with the permission of the court as it will help in bringing the disarranged individuals together.

The shortcomings of the Central legislation on the dowry system were discussed in Parliament sometime back.⁵¹ Several

50. Section 7: *Cognizance of offence*—Notwithstanding anything contained in the Code of Criminal Procedure, 1973—

(1) no court inferior to that of a judicial magistrate of the first class shall try any offence under this Act;

(2) no court shall take cognizance of any offence punishable under Sections 3, 4 and 48 except upon a complaint made within one year from the date of the offence, by some person aggrieved by the offence,

(a) where the person aggrieved by an offence is the wife complaint may be made on her behalf by her father, mother, brother, sister or by her father's or mother's mother or sister; and

(b) where such person is under the age of eighteen years or is an idiot or a lunatic, or is from sickness or infirmity unable to make a complaint, or is a woman, who according to the local customs and manners, ought not to be expected to appear in public, some other person may, with the leave of the court, make a complaint on his or her behalf.

(3) every offence under Section 4-A shall be cognizable: provided that no police officer below the rank of a Deputy Superintendent of Police shall investigate any offence punishable under this Act or make any arrest therefor. (Ed.: See, however, the Amendment Act, 1984).

51. See Promila Dandavate's Dowry Prohibition (Amendment) Bill, 1980 (Bill 90 of 1980) was introduced in the Lok Sabha on June 13, 1980 to deal effectively with the evil of dowry and was considered in Lok

members demanded that giving and taking of dowry should be made a cognizable and non-bailable offence, but this suggestion did not find favour with the Central Government. Public opinion continues to demand this reform in law. The problems of dowry system on account of diversity and variety of customs prevalent in different parts of the country continued to grow in different ways and this has been engaging the attention of the government for some years. In order to check the growth and evils of the system the Central Government allowed the individual State government to process and carry out amendments in the Dowry Prohibition Act, 1961 in the light of local conditions. Accordingly, under Article 245(2) read with Article 254(2) of the Constitution the States of Bihar, Orissa, Punjab, Haryana, Himachal Pradesh and West Bengal have passed legislations by amending the Central Act of 1961.⁵²

In pursuance of the recommendations made by the Committee on the Status of Women in India in its report in December, 1974, the Central Government have amended the conduct rules of its employees forbidding them giving or taking or abetting the giving or taking of dowry or demanding directly or indirectly any such dowry. Similar amendments have also been made by number of State governments in the conduct rules relating to their employees. The government of India has also issued orders to all the State Governments and Territory Administrations to make thorough and compulsory investigations by the police officers not below the rank of Deputy Superintendent of Police and to carry out post-mortem in all cases of married women dying in unnatural circumstances during the first five years of their marriages. The State Governments have further been directed

Sabha on 5 and 19 December, 1980. On 19 December a motion was moved in the Lok Sabha by the Minister of Law, Justice and Company Affairs to the effect that the question of the working of the Dowry Prohibition Act, 1961 and the amendments which might be made in the law for dealing effectively with the evil of dowry system be referred to a Joint Committee of both the Houses for examination and Report. After the adoption of the said motion in the Lok Sabha, Shrimati Promila Dandavate withdrew her Bill on the subject by leave of the House on the same day.

52. See the Dowry Prohibition (Bihar Amendment) Act, 1975; the Dowry Prohibition (Orissa Amendment) Act, 1976; the Dowry Prohibition (Haryana Amendment) Act, 1976; the Dowry Prohibition (Himachal Pradesh Amendment) Act, 1976; the Dowry Prohibition (Punjab Amendment) Act, 1976.

that disposal of bodies without post-mortem should not be permitted except with 'no objection certificate' issued by the police authorities. The Union Cabinet has approved the proposals to make dowry deaths a cognizable and non-bailable offence, to make cruelty leading to suicide punishable, and to shift the onus of proof on the accused. Thus the necessary amendments are to be introduced in the Indian Penal Code, 1860, Criminal Procedure Code, 1973 and the Indian Evidence Act, 1872. But all these laws can at best only serve to penalise the guilty. They cannot bring back the dead. They cannot even save the girl by preventing murder or suicide. She can be saved only by social groups and most effectively by a change in basic attitudes. She can only be saved if she is looked at as a socially productive human being of worth and not a mere slave and object of pleasure.

It is submitted that the isolated measures as adopted by the government will not be sufficient to curb the evil of dowry. The Central Act as a whole needs overhauling in the light of recommendations of the Joint Committee.⁵³ The Joint Committee submitted its report on the working of the Dowry Prohibition Act, 1961 in August 1982, but so far no action has been taken to amend the said Act. However, following suggestions are offered to make the law more effective and deterrent :

(1) Dowry should be made a cognizable and non-bailable offence. The onus of proving the innocence should be upon the accused.

(2) Offences under the Dowry Prohibition Act, should be made compoundable only with the permission of the court and on the execution of a personal bond by husband that he will neither realise dowry nor deny conjugal rights to the wife.

(3) All the marriages should be compulsorily registered and ceiling should be imposed on marriage expenses including a ban on vulgar display of wealth.

(4) A list of presents and articles given at the time of marriage should be registered with an officer to be appointed by the government in this behalf, for the purpose of seeing that the ceiling on dowry is not exceeded.

(5) All the presents given or taken immediately before or after marriage should be included within the definition

53. See *supra*, note 6, *Report of Joint Committee*, pp. 71-72.

of dowry and the pre-marriage ceremonies like 'Sagan', 'Thaka' and 'Tika' should be banned.

(6) For a meaningful understanding of dowry issue the term dowry must be extended to include the general right of appropriation of goods and services by a husband and his family over a wife and her natal family.

(7) Dowry articles should be treated as the '*Istridhana*' of the wife. She should have the right to take her belongings and in case of her death, her property should go to her children, but if she dies without children, it should be given back to her parents. In case her in-laws refuse to return the dowry articles on demand they should be held guilty of the offence of criminal breach of trust.

(8) Dowry cells should be created at all police stations. Dowry deaths should be certified by at least two doctors and the body of the deceased should be disposed of only after her parents approval. The Coroner's Act, under which the unnatural deaths in Bombay and Calcutta are subjected to an inquest within 24 hours of the occurrence must be extended throughout India.

(9) A person convicted under this Act should be disqualified from holding any post or office under the government for a period of three years from the date of his conviction.

(10) Separate family courts should be created for the disposal of matrimonial case including the dowry cases. This will in addition to providing some relief to women help creating a climate in which the neighbours will no longer be hesitant to report dowry cases simply because they are required to spend long hours in courts before taking their stand in the witness box.

(11) Women's Welfare *Samities* should be given some *locus standi* in the courts, so that they can act legally on behalf of the women in distress. There is also a need of vigilance committees consisting of representatives of voluntary organizations and government in every *mohalla* to check atrocities arising out of dowry. Women's counselling centres could obviate the necessity of parties going to the court with the centres themselves calling both the parties and helping them reach settlement.

(12) Free legal-aid cells should be constituted in various parts of the country to provide free legal aid and advice to the women for the enforcement of their rights.

(13) In view of the heavy onus of proof to be discharged for establishing an offence under the Act, it is desirable that

there should be some social service organization with a wing to collect evidence against the offenders.

(14) Marriage brokers should also be held responsible for the contravention of dowry laws.

(15) Proper formal education, marriages at an advanced age, and inter-caste marriages mainly settled by the parties themselves, and the awakening of the public conscience should be encouraged to stamp out the evil of dowry.

(16) It should be made obligatory on the parents of the bride to declare her share in the property and wealth till the date of the marriage and to ensure that her claim on the property and wealth of her parents even after marriage is respected.⁵⁴

(17) In the rural areas, it should be made obligatory on each Panchayat to report to the concerned Dowry Prohibition Officer about individual cases of dowry victims or generally the working of the Act in its area.⁵⁵

(18) The Act punishes both the 'giver' and 'taker' of dowry. But giver gives under duress and social compulsions, often of his own daughter, the would-be bride. He is also to be the chief complainant in any case filed under this Act. It is suggested that the "giver" should not be punished like the "taker".

54. *Id.* Minutes of Dissent by Promila Dandavate.

55. *Id.* 72.

POLYGAMY—A NEGATION OF QURAN

K. K. ARORA

Polygamy as an institution was in vogue in ancient Arabia even before the advent of Islam. The Prophet himself did not like polygamy but there were the following reasons which seem to have compelled the Prophet to tolerate it :

1. In ancient Arabia, fighting was the order of the day. A large number of males had either been assassinated or killed in battles leaving behind widows and females. If such young women were left to themselves they might have faced starvation, misery and taken to prostitution. Therefore, the Prophet tolerated polygamy to save these women from humiliation, destitution and immorality.
2. The Prophet had to mould an uncultured and semi-barbarous society where polygamy and unilateral divorce were fairly widespread. He did not think it proper to abolish this evil abruptly.
3. Due to constant warfare, the male population had considerably dwindled. Women outnumbered men. This was another compelling reason for the Prophet to tolerate polygamy.

Polygamy has become the most burning question of our times. Supporters of this institution feel that polygamy is sanctioned by the Quran, and therefore, it cannot be restricted by human legislation. The verse of Quran dealing with polygamy reads :

Of women who seem good in your eyes, marry one, two, three or four ; but if ye fear that ye shall not act equitably, then only one ; ...this will make justice on your part easier.¹

* Reader, Faculty of Law, University of Jammu, Jammu.

1. Quran, IV : 3.

In the same context the Quran adds :

And ye will not have it at all in your power to treat your wives alike, even though you would fain do so.²

If we try to examine these Koranic verses, we shall find that these verses do not point to polygamy. They clearly point to monogamy. The Quran permits a person to have a maximum of four wives provided he can treat them alike. But the second verse clearly says that it should not be possible for a man to treat his wives alike. Equal treatment to co-wives in food, clothing, lodgment and affection is simply not possible. In the words of Ameer Ali, "(t)he conditions under which polygamy is permitted are so difficult of compliance that they amount to its virtual prohibition".³

Kamila Tyabji has conducted an interesting study of the types of polygamy existing in India and based on that study she has classified polygamous marriages as follows :⁴

- (a) In the first group of cases the husband does not live with two wives. He simply abandons his first wife and goes off to marry another woman. In most of such cases the second wife even does not know about the earlier marriage. This is simply desertion followed by bigamy. Can this behaviour be justified by Koran?
- (b) In the second group of cases, the wife finding the marriage unbearable leaves her husband and goes to her parents' home. In order to avoid the payment of deferred mahr or due to some other reason, the husband refuses to divorce her but at the same time contracts a second marriage. Does this behaviour of the husband not violate the Koranic injunction permitting polygamy?
- (c) In the third group of cases, the wife continues to stay with the husband even when he acquires a second wife. The reason for this is nothing but economic dependence

2. *Id.*, verse 129.

3. Amir Ali: *Mohamedan Law*, p. 188 (6th Ed.).

4. Kamila Tyabji: "Polygamy, Unilateral Divorce and Mahr in Muslim Law", in *Islamic Law in Modern India*, p. 142.

of the wife. Obviously in a situation like this the husband cannot be just and equitable in dealing with his two wives.

- (d) The fourth group covers cases of fraudulent conversions. A person of another religion adopts Islam in order to contract a second marriage which is not permitted under his own religion. There is an urgent need to suitably amend the law to remedy this loophole.
- (e) Lastly there are very few cases where a woman may not object to her husband's contracting a second marriage because she is ill or too old or for some other reason.

Tyabji feels that those who defend polygamy have only the cases falling in the last category in mind. But unfortunately the cases falling in the last category are woefully small and in the rest of the cases, a Muslim husband by contracting a second marriage clearly violates the Koranic injunction which says that if a man cannot treat his two wives with perfect equality, he is enjoined to marry only one wife.

Surprisingly, polygamy is on the decline in the countries of its origin. It appears that social consciousness in these countries had awakened against the institution of polygamy. Thus Tunisia, which is wholly Muslim, has totally prohibited polygamy on the ground that the 'verse on polygamy' required the polygamist to show equal justice to all his wives—an impossible feat for any man other than the Prophet. So the law is justified in banning plural marriages as they virtually violate the holy injunction. Other Muslim countries have, no doubt, not gone to the extent of prohibiting polygamy, yet most of those countries have introduced far-reaching reforms in their laws regarding matrimonial causes. Syria, Morocco and some other West Asian countries have made laws to ensure that the man has the financial capability to treat his co-wives equitably.⁵ The Pakistan law of 1961⁶ considers not

5. See for details, Tahir Mahmood: *Family Law Reform in the Muslim World*, p. 276 (1972).

6. *Id.*, pp. 277-78.

only the financial ability of a man but also the consent of the first wife and other compelling reasons for taking a second wife.

There are, however, some countries like Egypt which have not introduced any reforms in the law of polygamy. Reasons for not tampering with the law of polygamy may be the fact that either the incidence of polygamy in those countries is only marginal; or the predominant public opinion is against the incorporation of any changes in the traditional law obliquely permitting plural marriages. J.N.D. Anderson, an eminent jurist of Islamic law, has remarked:

The measures of reform in the law as a whole which have been introduced in most of these countries over the past century, provide both a mirror and a gauge of their social progress and even national development . . . the measures of reform . . . constitute a most significant example of modernism in Islam and a fascinating illustration of how a theoretically immutable law can, in fact, be amended in practice.⁷

For our country no exact figures are available as to the incidence of polygamy amongst Muslims. But it cannot be denied that there is a fairly large section of Muslim population in India which has come to realize that the circumstances which made the existence of polygamy at first necessary, are fast disappearing and this institution is opposed to the teaching of the Prophet.

In the words of the great jurist Ameer Ali: "The conviction is gradually forcing itself on all sides, in all Muslim communities, that polygamy is as much opposed to Islamic laws as it is to the general progress of civilized society and true culture. In consequence of this conviction a large and growing section of Islamists regard the practice of polygamy as positively unlawful."⁸

According to V.R. Krishna Iyer, "a provision for monogamy in contemporary India would fulfil rather than fail the Prophet".⁹

The judgment of Dhavan, J. in *Itwari v. Asghari*¹⁰, is very encouraging. In this case a Muslim husband filed a suit for restitution of conjugal rights against his first wife who had left

7. J. N. D. Anderson: *Islamic Law in the Modern World*, p. 18 (1959).

8. *Supra*, Note 3.

9. V. R. Krishna Iyer: *Social Mission of Law*, p. 176.

10. AIR 1968 All 684.

him as a consequence of his contracting a second marriage. While dismissing the suit, the court held that "polygamy as an institution is to be tolerated but not encouraged and the Muslim law has not conferred upon the husband any fundamental right to compel his first wife to share his consortium with another woman in all circumstances". The court further said: "The onus today would be on the husband who takes a second wife to explain his action and prove that his taking a second wife involved no insult or cruelty to the first and in the absence of cogent explanation the court will presume under modern conditions that the action of the husband in taking a second wife involves cruelty to the first and it would be inequitable for the court to compel her against her wishes to live with such a husband."¹¹

It is a fact that under the existing Indian conditions where our teeming millions are leading a life of poverty, financial hardship and tremendous psychic strain, it cannot be expected of a Muslim husband that he would be able to show equal justice to his co-wives. Again, when most of the Muslim countries have swung towards monogamy there is absolutely no reason why a suitable legislation in this regard be not made in India too. But it is not easy to abolish polygamy by legislation in India. Muslims in India look at reforms in their personal law with suspicion. They fear that if once they agree to any such reform, the State thereafter may, in the name of reforms, pervert the religious aspect of the Muslim society. Some still feel that the Quran is infallible and unchangeable. J.N.D. Anderson has rightly said: "The greatest need of the time is to convince them (the Muslims) that their law as it is administered in India today stands in urgent need of reform."

Muslims have lurking fear in their minds that someone is out to destroy their religion. In 1963 when an attempt was made in Parliament to carry out the mandate of Article 44, a bitter controversy was generated throughout the country and the attempt was abandoned. In 1966 the All-India Muslim Majlis-e-Mushawarat brought out its 9-point manifesto holding out its pledge to preserve the Muslim personal law.

11. *Id.*, p. 687.

12. *Supra*, Note 7.

The Academy of Islamic Research and Publications at Lucknow has brought out numerous publications emphasising as to how blasphemous the idea of tampering with Shariat law can be. In fact, different sections of Muslims have time and again publicly opposed the adoption of any reform in their personal law. They have expressed that, no doubt, Shariat law can be reformed by a predominantly Muslim legislature in a West Asian country, the same thing cannot be done in India where the legislature is predominantly non-Muslim.

In these circumstances one certainly cannot ignore the Muslim sentiments and carry out reforms in their personal law without first taking them into confidence. They have to be convinced rather than coerced in accepting any change in the Shariat law. It can also not be denied that there is an enlightened section of the Muslim scholars who have stressed the need for incorporating reforms in the Muslim personal law.

Ottoman Majelle has said :

It is an accepted fact that the terms of the law vary with the change in the time.¹³

A.A. Fyzee, an eminent authority on Muslim law, has said :
 "Legislation is not a bidat (sinful innovation) but righteous action to give justice where it is due. For cogent reasons reform by legislation seems to be the best remedy."¹⁴

Kamila Tyabji has said :

Would the men lose some sacred right under the Quran if they gave up the right to have more than one wife?... When a purely permissive right is given to you, you cannot be considered un-Islamic if you give it up.¹⁵

Therefore it can safely be concluded that conservative forces are trying to keep the Muslim law without any change while the progressive forces are trying to modify the archaic law to suit the changing needs of the modern society.

13. Majelle, Article 39. C. A. Hopper, 1 *Civil Laws of Palestine and Trans-Jordan* (1933).

14. Asaf A. A. Fyzee: *The Reform of Muslim Personal Law in India*, p. 13 (1971).

15. *Supra*, Note 4.

Methodology of Reform

It may be kept in mind that the Muslim community in India which is hostile to any change in the personal law would have to be persuaded to reconcile itself to reforms so that it accepts them without agitation. There is need for extreme caution if the Parliament decides to pass any legislation in this regard. No such change can ever be visualized without the active participation of the affected community. If ever a congenial climate for effecting reforms in the personal law of the Muslims is created, then the following measures can be kept in contemplation for controlling polygamy :

- (i) In Iran a person cannot contract a second marriage without the permission of the court. Before giving the permission for the second marriage the court will satisfy itself :
 - (a) that the husband has the capacity to maintain more than one wife ;
 - (b) that injustice between the wives is not feared and the husband has the capacity to treat the co-wives equitably ; and
 - (c) that some lawful interest or benefit is involved in the second marriage.

This can be an effective method of controlling polygamy and can be tried in India as well. Major advantage of this technique is that it will help in effecting a reform within the framework of Muslim jurisprudence.

- (ii) Jordan, Tunisia and Morocco have controlled polygamy by allowing the incorporation of anti-bigamy stipulations in the marriage contracts. Such stipulations do not prohibit second marriage but only confer a right on the first wife to ask for the dissolution of her marriage if an anti-bigamy condition is violated. Such stipulations in marriage contracts are designed primarily for the benefit of the wife and would not be contrary to the spirit of the traditional Muslim law.

- (iii) In an important judgment the Pakistan Supreme Court has held in *Khurshid Bibi v. Mohd. Amin*¹⁶, that under Muslim law a wife can claim 'Khul' as of right if she alleges that her marriage has become intolerable and satisfied the court that it will otherwise mean forcing her into a hateful union. This is a highly progressive pronouncement and could be followed by the courts in India too. If a wife alleges that as a consequence of her husband's taking a second wife her life has become miserable, the courts should show the audacity of granting her *Khul* as of right.
- (iv) Professor Derret¹⁷ has suggested that suitable legislation should provide remedy of damages where Muslim personal law injuriously affects any party. It is submitted that the remedy of damages can certainly impose an indirect restraint on the Muslim husband who may be subjecting his first wife to mental and economic strain by contracting a second marriage. But would not the remedy of damages if provided by a statute, have the effect of altering the traditional Muslim law? How would the conservative section of the Muslims react to such a piece of legislation? These are ticklish questions and require careful examination in the context of socio-religious philosophy governing the decision-making at the State level.

Lastly, it may be submitted that though the 4th century marked "the closure of the Gates of Interpretation" yet the Muslim jurists of the stature of Abdur Rahim and Fyzee believe that Muslim law was never intended to be static. There is nothing in Islam that could stand in the way of reinterpretation of this living law to bring it in tune with the contemporary social and moral values. A committee of Muslim jurists can certainly undertake the onerous task of examining the ailing areas of Muslim personal law and recommend suitable remedies. These recommendations will be of high persuasive value in pacifying reaction from the orthodox sections of Muslims and also help in averting any injury to the secular fabric of this infant democracy.

16. PLD 1967 SC 97.

17. J. D. M. Derret: *Religion, Law and the State in India*, pp. 546-554 (1918).

THE PARADOX OF FEMALE SUCCESSION IN CUSTOMARY LAW IN KASHMIR : THE INSTITUTION OF DUKHTARI- KHANA-NASHIN

NISAR AHMAD GANAI

1. Introduction

Custom in Kashmir valley, as in rest of the country, has been of supreme importance in so far as succession, adoption and other familial matters are concerned. The Muslim Personal law (*Shariat*) Application Act, XXVI of 1937, which abolished the legal authority of custom among the Muslims of British India, did not extend to the State of Jammu and Kashmir, and consequently custom continued to govern Muslims of Kashmir in all such matters. The state of the customary law in Kashmir has at present reached a stage when it could no longer be said to be stored up as unexpressed consciousness of the people. It has clearly manifested itself in external acts giving a shape and content to familial institutions and practices which regulate relationships within a family.

The overriding importance of the customary law in Kashmir is borne out by Section 4 of the Jammu and Kashmir Sri Pratap Consolidation of Laws Act, 1977, *Samvat*, which specifically provides that "in all questions regarding succession, inheritance, special property of females, divorce, dower, adoption, guardianship, minority, bastardy, family relations, castes or religious usages or institutions, the rule of decision in this province is the personal law of the parties *excepting in so far as such personal law has been modified by any custom applicable to the parties concerned*".¹ This

*B. Sc.; LL. M. (Alig.), Reader, Department of Law, University of Jammu, Jammu.

The author owes great deal to Professor D. N. Saraf, Head of the Department of Law, University of Jammu, whose empirical approach and guidance provided inspiration for the completion of this work. The author is also thankful to ICSSR, New Delhi, for providing financial assistance to conduct this study.

1. J&K Local Laws, Vol. (I), p. 225.

Regulation settled the debated question whether the personal law of the parties or the local custom was to govern in the first instance, by laying down what was to be "the rule of decision". The first rule was declared to be "the personal law of the parties excepting in so far as that personal law is modified by any custom applicable to the parties concerned". By another provision, it was clarified that "all local customs shall be regarded as valid unless they are contrary to justice, equity and good conscience or are declared to be void by a competent authority".² The Regulation³ does not make any distinction between an agriculturist and a non-agriculturist. It lays down "a rule of decision" for all classes without distinction of caste, creed or calling. There is no initial presumption that townsmen or non-agriculturists are necessarily governed by their personal law in all matters concerning their family relations. But whenever parties allege and prove that their personal law has been varied by any customary rule they shall be governed by that customary rule.⁴

The courts in the State of Jammu and Kashmir including the trial courts, the High Court⁵ and the late Board of Judicial Advisors⁶ have been enforcing and maintaining the supremacy of customs over the rules of Muslim personal law. The revenue courts have gone a step ahead by holding that "inheritance to landed estate in Kashmir Province is governed by custom and not by the *Shariat*".⁷ The sum and substance of the decisions of the revenue courts is that in matters of inheritance of agricultural land in Kashmir valley, the first "rule of decision" is

2. Section 5 of the Jammu and Kashmir Consolidation Regulation of 1977.

3. *Supra*, N. 1.

4. Ganjoo, N.K.: *Customary Law of Kashmir*, p. 51 (1959).

5. "It has been laid down quite clearly a number of times that ordinarily parties are governed by their personal laws and the only exceptions are those in which one or the other party prove successfully that personal law is abrogated by such customs as are found to be prevailing." *Akbar Rather v. Azizi*, 8 J & K LR 264, per Masud Hassan, J.

6. "It is well established rule of law that a custom supersedes the ordinary law so as far as it is proved and everything beyond the proved custom must be governed by such law. Not only each custom but alleged separate incident of a custom must be proved to exist as customary law." *Ahad Lone v. Azizi*, 8 J & K LR 118, per Niamat-Ullah, President, Board of Judicial Advisors.

7. *Abdullah v. Mst. Fazi*, Revision Petition No. 101 dated 18th Har 2007 decided on 18th Assuj 2007.

the custom and not the personal law of the parties as modified by custom. Accordingly, in this State, to use the language of the Privy Council, "clear proof of usage would outweigh the written text of the law".⁸ The civil courts following the directive of Sri Pratap Consolidation of Laws Act, have allowed the customs to prevail.⁹

It is well established that in Kashmir valley, Muslim law does not govern the right of inheritance of Muslims but such law as modified by custom. The general rule of succession under the customary law in Kashmir valley is that succession first goes to the direct male lineal descendants of the last owner to the exclusion of female descendants, "excepting in the case of daughters who have been married at home by their fathers in their lifetime".¹⁰ If there be no male lineal descendants of the last male owner, subject to certain life estates in favour of some females, the inheritance devolves upon the collaterals among whom the right of representation exists, all heirs sharing equally.¹¹

The customary law as applicable to the Muslims in the valley of Kashmir is a source of hardship to Muslim females. It excludes all females except a *dukhtari khana nashin*¹² of the propositus from inheritance. A *dukhtari khana nashin* is entitled to take the entire property of her deceased father to the exclusion of her other sisters because of the custom which debars the other non-resident daughters of the deceased father to claim share in the estate of their father. The daughters of same parents form a class and preference of a daughter or daughters to the exclusion of others is a discrimination and violation of the constitutional guarantees as enshrined in Articles 14¹³ and 15¹⁴

8. *Collector of Madura v. Mootoo Ramalinga*, 12 MIA 397 (1868).

9. For details see S. R. Dogra's *Code of Tribal Customs in Kashmir* (1938); N.K. Ganjoo, *Customary Law of Kashmir* (1959).

10. *Supra*, N. 4, p. 230.

11. *Ibid.*

12. A daughter who after the solemnisation of marriage resides with her husband in her father's home.

13. Article 14 of the Constitution of India provides that "the State shall not deny to any person equality before the law and equal protection of the laws within the territory of India".

14. Article 15(1) of the Constitution of India provides that "the State shall not discriminate against citizens on grounds only of religion, race, caste, sex, place of birth or any of them".

of the Constitution of India. The *dukhtari khana nashin* divests the father's widow from all heritable property. The mother and son's widow are also excluded by her. The customary law, therefore, has placed Muslim females of Kashmir in disadvantageous position as compared with females of other religious denominations.

The purpose of this paper is to focus attention on identifying the magnitude of the problem of exclusion of females from inheritance and the evasions developed to mitigate the hardship. One of the ancillary purposes is to assess the magnitude of the prevalence of the custom of *dukhtari khana nashin* and its impact on the social and economic conditions of Muslim women.

2. Methodology

Studies of customary law are necessarily complicated. These involve an understanding of the nature and scope of the custom, the judicial findings regarding the custom and the effect of the custom on the well being of the community.

There is scant material available on the subject. No scholar has written a standard work on the origin and development of customary law among the Muslims of the valley. Sant Ram Dogra's *Code of Tribal Custom* incorporates the customs observed by the inhabitants of the valley on all matters concerning their family relations, succession, inheritance, adoption, dower, divorce and so on.¹⁵ This Consolidated Code of Customs may well be called the *Rivaj-i-am* of Kashmir. The value of entries contained in this Code has been accepted with varying degrees by courts in Kashmir. This has resulted in a mass of conflicting decisions which instead of defining and consolidating the customary law has tended to create confusion and uncertainty in law. Authoritative

15. In the year 1972-73 (*Samvat*), Pandit Sant Ram Dogra, Assistant Settlement Officer of Kashmir, was put on a special duty and was charged with the task of the preparation of a Consolidated Code of Tribal Customs prevalent in Kashmir. To discharge this duty he toured the different parts of the valley and made inquiries almost on all questions regarding succession, inheritance, family relations, dower, divorce, adoption, marriage etc. from the people. On the basis of this inquiry, he compiled a Code incorporating therein the customs observed by the inhabitants of the valley on all matters concerning their family relations, succession, inheritance, adoption, dower, divorce and so on. This Code is a compendium of questions and answers about different matters covered in the book.

evidence of the customs is available from Jammu & Kashmir Sri Pratap Consolidation Regulation, 1920, and court and administrative decisions.

In order to make the study broadbased it was found indispensable to conduct field studies. The importance of social sciences techniques in the sphere of law has been well recognised. Empirical research has found favour with legal scholars and the relevance of such techniques has been stressed by eminent scholars and few studies of great significance have been conducted.¹⁶ The matters relating to customary law in Kashmir are no longer a subject-matter of armchair opinion. Empirical studies are imperative so as to discover the attitudes among the members of the Muslim community in the valley towards the customs which regulate the devolution of the property in a changing society.

The spatial concern of the present study should have been the entire valley of Kashmir, comprising of six districts, and this would have been an ideal situation. But this was not possible because of paucity of time and resources. Hence one district, that is, Anantnag, was chosen as the locale for the study. This district was chosen for the reasons, firstly that the investigator belongs to that district and has the working knowledge of the customs of the Muslims in that district. Secondly, problems of access to Muslim households to make inquiries regarding certain delicate questions of marital relations would not have been as formidable as in other districts in which the investigator has not many contacts.

The district of Anantnag has a population of 832,280 out of which 789,224 are Muslims, constituting 94% of the total population of the district.¹⁷ For practical reasons, it was decided to study a sample of hundred households.¹⁸ The type of detailed

16. S.N. Jain: "Doctrinal and non-Doctrinal Research", 1975 *JILI* 515; D.N. Saraf: "Relevance and Utility of Empirical Research in Law" in *Legal Research and Methodology*, p. 611 1982; Upendra Baxi: "Socio-Legal Research in India—A Programme Schrift" in *Legal Research and Methodology*, p. 416 (1982).

17. These figures are based on the Census Report of 1971. The Census Report of 1981 has not given the number of Muslims residing in the district.

18. The household for the purpose of this study consists of father, mother and male lineal descendants.

information required for the purpose of the study precluded any attempt to obtain a truly representative sample of Muslims. In spite of one's keen awareness of sampling errors, one cannot completely avoid them in studies which deal with familial matters because one can gather information from only those persons who are willing to supply it. The subject of study being such, a considerable number of refusals were accepted. So even to try to get a purely random sampling would have been fruitless. The data were gathered on the basis of purposive sampling, because of the non-availability of systematic record regarding the households with history of *khana damads*¹⁹ or *dukhtari khana nashin*. In view of this limitations, random sampling could not be adopted as a basis for data collection. For obvious reasons and practical advantages, it was not possible to base this study on any other method than the purposive sampling. In selecting the respondents, an attempt was made to make the sample as broadbased as possible in terms of basic characteristics of income and occupation. No specific criteria, except the income and occupation, could be adopted. But efforts were made to give representation to all sections of Muslim population.

The respondents interviewed for this study were divided into four categories, namely (i) agriculturist group comprising of land-lords, tenants, agricultural labourers and intermediaries; (ii) business community group comprising of shopkeepers, contractors, factory holders, hotel owners and persons engaged in private business of their own; (iii) professional group comprising of three sub-groups, namely (a) highly qualified sub-group to include judges and advocates of higher and lower courts, college and university teachers, engineers working in public and private sector, doctors working in hospitals, government dispensaries, teaching in medical colleges and those engaged in private practice; (b) less qualified sub-group to comprise of teachers and administrative staff. It was planned that the group of teachers should include teachers of primary, high and higher secondary schools. The administrative staff should include employees right from the clerical staff to the highly paid administrative, revenue, managerial and executive staff working in government, semi-government

19. Resident son-in-law.

and private offices; (c) self-employed skilled persons sub-group should include skilled persons like carpenters, barbers, tailors, masons, painters, mechanics, potters, weavers and *shaksaz*²⁰; (iv) low caste group to include *chowkidars*, maidservants, midwives, shoemakers and sweepers.

Every subject selected as a sample unit was personally and individually interviewed on the basis of the structured Interview Schedule. The subjects were requested to be candid and honest in answering questions and their anonymity was assured. It was impressed upon them that there was no question of their answers being "right" or "wrong" and that all that was wanted was that their answers should reflect their true feelings and reactions with regard to particular issues. They were assured that information given by them would be treated as strictly confidential and would be used for no purpose other than that of research.

Much difficulty had to be faced in convincing the subjects and enough time was spent in removing their misgivings. Some people refused point blank to give interview as soon as they came to know of the topic on which queries were made. They thought that this was an enquiry by the government in connection with the changes contemplated in customary and Muslim personal law. By repeatedly calling on them, convincing them of the actual purpose of the interview and requesting them to be cooperative, ultimately they agreed to supply the required information. There were others also, who although did not refuse to give the interview yet, on one pretext or the other tried to evade the interview on several occasions even after making appointments. For example, at the specified time they would postpone the interview on the pretext of their being very busy. At times they would even disappear shortly before the appointed time just to avoid the interview. They probably thought that after postponing the interview for a couple of times or more they would not be approached any further and thus would be spared. But these people were patiently and persistently pursued and repeatedly visited and finally they gave the interview. It was also

20. A person who makes *kangar*, a small earthenware bowl of a quaint shape, held in a frame of wicker work. In winter and in summer when rains chill the air, hot embers are put into *kangar* and it is slipped under the voluminous gown (*phiran*) which Kashmiris wear.

very difficult to interview women respondents due to their shyness, lack of education and the *pardah* system. However, the male members of their families helped the investigator to get the relevant information from them. Despite these drawbacks and difficulties, the respondents who cooperated with the investigator deserve commendation for their help.

The data for this study has been collected through both primary and secondary sources. Most of the primary data was collected through Interview Schedule which had been constructed on the basis of considerable preliminary readings. The Interview Schedule used was mostly structured but for the intermittent open ended questions to allow the interviewee to give vent to his or her feelings, ideas and emotions and to give the interviewer an opportunity to gain insight into the unexplored areas of familial matters. Because of the familiarity of the investigator with customs and mores of the inhabitants of the district, it needed effort and determination to subdue prejudices and bias in evaluating the responses collected from various sources.

The data and materials have also been taken from secondary sources. These include religious books of Muslims, authentic texts of Muslim Law, digests of customary law in British India and English translation of the Holy *Quran*. The secondary data has also been scanned from official and unofficial records and registers maintained by several departments and different libraries of the State. The data regarding the application of customary law by the revenue courts was collected from the office of the Financial Commissioner of the State. The data thus collected has been tabulated and analysed through the modern scientific techniques.

3. **Dukhtari Khana Nashin : A Privileged Female Heir**

Artificial kinship is a well recognised and widely practised mode of strengthening societies. By means of artificial kinship strangers are adopted into a clan or kindred. Various methods are employed for this purpose of which the most celebrated in Kashmir valley is the institution of *dukhtari khana nashin* or the recognition of *khana nashin dukhtar* as an heir of the status of a son.²¹ In many families where an ancestor has no male issue but

21. *Supra*, N. 10, p. 183.

only a daughter, the usual way employed for the purpose of continuing the clan is to marry the daughter at home and bring a husband into the family for her. This system of having a daughter at home along with her husband is at present resorted to by Kashmiri Muslims, and instances are not wanting in which the Kashmiri Pandits and Sikhs too have made their daughters as *dukhtari khana nashin*. It would not be incorrect to state that this institution is followed by most of the inhabitants of the valley. The institution seems to have its origin in the Hindu law which was followed in various parts of India before the enactment of the Hindu Succession Act, 1956. Among the Hindus, in the absence of a son, a daughter's son especially appointed for that purpose was next in importance to the natural born son. *Putri-ka-Putra* has been described in the *Smritis* as efficacious as a natural born son.²² This is in spite of the fact that a daughter's son could not be adopted under the tenets of strict Hindu Law. The institution of *dukhtari khana nashin* may, therefore, be described as the appointment of a daughter to bring male issues in the family.²³

The custom of the institution of *dukhtari khana nashin* in Kashmir valley has not merely been recognized in judicial decisions of the highest courts in the State²⁴, but the recognition of the rights of a daughter's husband (*khana damad*) and the mode of effecting mutations in favour of *khana nashin dukhtars* have found its place in the Revenue Acts and Orders.²⁵ The main object of

22. *Id.*, p. 104.

23. *Ibid.*

24. *Mala Bibi v. Taja Bibi*, 1937 PLR (J & K Section) 149; *Aziz v. Gani*, 1936 PLR (J & K Section) 104; *Mst. Khatooni v. Aziz*, decided by the High Court on 24th Sawan 2001; *Sona Khan v. Rajab Parray*, decided by the Jammu and Kashmir High Court of Judicature on 9th of Assuj 2002; *Aziz Dar v. Mst. Farzi*, decided by the High Court of Judicature on 5th of Kartik, 2000; *Ramzan v. Mst. Khatji*, 9 J & K LR 123; *Mst. Khatooni v. Lassa*, AIR 1959 J & K-52; *Mst. Safa v. Mst. Fatima*, AIR 1963 J & K 4; *Mumtaz Begum v. Aman Ullah Khan*, AIR 1973 J & K 28.

25. Jammu & Kashmir Tenancy Act, 1980, *Samvat*, Jammu and Kashmir Agrarian Reforms Act, 1976 A.D. and the Revenue Department Standing Order No. 23-A prepared by the Revenue Minister by virtue of the powers vested on him under S. 43 of the Jammu & Kashmir Land Revenue Act, 1980, *Samvat*. Under S. 33, clauses (e) and (f) of the present Land Revenue Act of 1996, *Samvat* the Government is competent to make rules regulating the procedure of Revenue Officers under the said Act in cases for which no procedure is prescribed by the Act itself. No rules have been prepared by the Government by virtue of the powers vested in it under this section. But Section 2 of the Act provides that "all rules, appointments, assess-

having the system of a *dukhtari khana nashin* is to preserve all outside grafting on a stock whose male descendants have exhausted and to preserve the devolution of the property into the hands of a relation who is connected through a direct line of descent, whether male or female, to the ancestor.²⁶ The recognition of a *dukhtari khana nashin* as an heir of a status of a son of the deceased has given rise to litigation in all such cases which may have a lacunae. There has, therefore, been complicacies in the law; subtleties, refinements and sometimes contradicting rules have been imagined or invented. A formidable body of law has been developed from modest beginning regarding this institution. The essentials of the institution are as under.

Who can be appointed Dukhtari Khana Nashin

A daughter is said to be *dukhtari khana nashin* if she is kept at home by the father and a husband is brought into the family for her. The husband brought for her is called *khana damad*. The *khana damad* instead of taking the girl away to his own house lives with her in her father's house performing services for him and helping to manage his property. A *khana damad* must be a person whom the *dukhtari khana nashin* could be legally given in marriage. As such a maternal uncle or a paternal uncle cannot be brought as *khana damad* into the family for a daughter.²⁷

Who can appoint a Dukhtari Khana Nashin

The words "*dukhtari khana nashin*" clearly imply that it is

ments and transfers made, notifications and proclamations issued, authorities and powers conferred, farms and leases granted, records framed, revised or confirmed, rights acquired, liabilities incurred, times and places appointed, and other things done under any of such rules and orders, shall so far as may be, deemed to have been respectively made, issued, conferred, granted, framed, revised, confirmed, acquired, incurred, appointed and done under the Act itself. Thus the rules contained in Revenue Department Standing Order No. 23-A prepared under S. 43 of the Jammu and Kashmir Land Revenue Act, 1980. *Samvat*, are deemed at present, for purpose of mutations *Hidayat* to be rules made under the present Land Revenue Act of 1996, *Samvat*. Under S. 68 of Jammu & Kashmir Tenancy Act, 1980 *Samvat*, an appointed heir cannot succeed to a right of occupancy without the consent of a landlord and an appointed heir has been deemed to include a son adopted in accordance with customary law and also a *khana damad* but not an illegitimate son. Thus the custom of *dukhtari khana nashin* has found its place in Revenue Acts and Orders.

26. *Supra*, N. 23, p. 103.

27. *Id.*, p. 112.

either father or a mother who can make their daughter a *khana nashin*. A brother cannot as such make his sister as *khana nashin* for his own property. She would then no longer remain a *dukhtari khana nashin*, but would be a *hamsheera khana nashin*. Nor can a paternal uncle make his brother's daughter a *dukhtari khana nashin* for his brother to succeed to his property.²⁹ There does not seem to be any direct authority in the Code of Mr. Dogra as to the making of a *dukhtari khana nashin* by a father or a mother. The Code states that "an unmarried daughter inherits her father's property till her marriage and on her marriage the property goes to the agnates of the father".²⁹ This may imply that unless the father makes his daughter as *khana nashin* at the time of marriage, she cannot inherit the property after her marriage. The Code at another place states that "daughters become heirs when they are kept at home and husbands are brought into the family for them".³⁰ So a person capable to give a daughter in marriage to another has got also a right to bring in a husband for such a girl to reside at her father's house, and possibly the right may not exclusively rest with a father to make his daughter a *dukhtari khana nashin*. If that were so the words used in *Rivaj-i-am*³¹ would have been: "Daughters become heirs when they are kept at home and husbands are brought into the family by their father."

The courts in the State from time to time have laid down that it is only a father who has got the right to make daughter a *dukhtari khana nashin* and as a result of these decisions,³² if a father dies leaving a widow and an only unmarried daughter the widow has no right to make her daughter a *dukhtari khana nashin*. The then Revenue Minister,³³ Shri V.N. Mehta, in *Mst. Fazli v. Rasool*³⁴

28. *Id.*, at pp. 113-114.

29. S.R. Dogra : *Code of Tribal Customs in Kashmir*, 1938, p. 9.

30. *Id.*, p. 40 in answer to question No. 40.

31. *Supra* N. 29.

32. *Mst. Mukhti v. Aziz*, decided on 19th Har, 1996; *Mst. Khatooni v. Azizi*, decided by the High Court (DB) on 24th Sawan, 2001; *Mohammad v. Mst. Mukhti* decided on 24th Assuj, 1991; *Mst. Fazli v. Rasool*, Revenue Appeal No. 86 of Samvat, 1992; *Sona Khan v. Rajab Parey*, decided by the High Court on 9th Assuj, 2002.

33. By virtue of S. 8 of the Jammu and Kashmir Land Revenue Act, the Revenue Minister exercises superintendence and control over all Revenue Officers in the State. Thus the Revenue Minister acts as the highest Revenue Court in the State.

34. Revenue Appeal No. 86 of Samvat, 1992.

held, "there is no question of the girl being declared a *dukhtari khana nashin* by any one else. There is no law to that effect nor the direction of the father. This decision went a step ahead and according to this decision, therefore, if there is a specific direction existing on behalf of the father, daughter can be made a *dukhtari khana nashin* by anyone else having a right to give her in marriage after her father's death. Contrary to this, in a prior decision, *Mohammad v. Mukhti*³⁵, the same Revenue Minister had clearly held: "The right exists exclusively with the father and none else to make a daughter a *dukhtari khana nashin* and that the question of the intention of the father by producing oral and written documents subsequent to the father's death in favour of the daughter as *dukhtari khana nashin* does not at all arise."

As a result of these cases, the right of making a *dukhtari khana nashin* exclusively vested with the father and the mother had no right to make her daughter a *dukhtari khana nashin* even though the father would die when his daughter would be so young in years that the question of marriage could not arise. As to the intention of the father, there did not exist any uniformity in the decisions whether such intention could or could not be taken into consideration.

But His Majesty in his capacity as the highest Revenue Court leaned towards the mother and recognised her right of making a daughter as *dukhtari khana nashin* in *Mst. Khatiji v. Nabir*³⁶, declaring the judgment of the Revenue Minister that a daughter would be *dukhtari khana nashin* if her father makes it so "ill judged" and held that "custom of making a *dukhtari khana nashin* by a father, even if it exists, cannot be accepted for minor daughters who are entitled to consideration and would never become *dukhtari khana nashin*". According to this decision, therefore, even a mother has got a right to make her minor daughter as *dukhtari khana nashin* provided the father does not exist at the time of marriage, but it does not confer upon the mother a right to make a daughter a *dukhtari khana nashin* during the lifetime of her husband.

This trend of revenue courts favouring a mother's right to

35. Revenue Appeal No. 86 of *Samvat*, 1991 decided on 24th *Assuj*, 1991.

36. His Highness Order dated 15th of April, 1937.

make her daughter a *dukhtari khana nashin* did not survive for long. Even after the decision by His Highness, it was held by revenue courts that *the right to make a daughter a dukhtari khana nashin exclusively rests with the father and the mother has no right to make her daughter a dukhtari khana nashin after the death of the father of the daughter.*³⁷

These decisions have been followed in a number of cases subsequently by the High Court of the State.³⁸ Their Lordships of the High Court observed :

“There is a custom prevailing in the valley with regard to the making of *dukhtari khana nashin* but that custom is to the effect that *dukhtari khana nashin* is made not by the mother but by the father during his lifetime.”³⁹

The debatable question whether the mother of a Muslim girl living in the valley has a right to confer upon her daughter the status of a *dukhtari khana nashin* after the death of her husband in pursuance of a direction of her deceased husband, was considered at length in a reference by a full bench of Jammu and Kashmir High Court in *Saja v. Ahad Sheikh*⁴⁰, in the light of all previous decisions on the question with a special reference to His Highness decision.⁴¹ Treating the decision of His Highness as of the highest revenue court and, therefore, not binding on subordinate civil courts, Shahmiri, J. observed : “It is the father and father alone who could make his daughter a *dukhtari khana nashin*.”⁴²

No doubt the High Court has resolved the conflict among the courts in the State but this decision does not provide an answer to the question as to who is the competent person, father or mother, to declare a daughter a *khana nashin*, when the whereabouts of the father are not known or when father becomes an apostate or when father has been declared of unsound mind or when father is guilty of desertion or cruelty and the daughter or daughters reside with

37. *Mst. Mukhti v. Azizi*, decided on 9th of Har, 1996.

38. *Mst. Zebi v. Mohammad*, decided by the High Court on 12th of Assuj, 2000. In *Aziz Dar v. Mst. Farzi* decided by the (DB) High Court on 5th of Kartik, 2000, their lordships held : “As Mst. Farzi was married long after the death of her father she could not be made a *dukhtari khana nashin* for it is the father alone who can make his daughter as *dukhtari khana nashin* at the time of her marriage and no one else can do so.”

39. *Mst. Khatoon v. Aziza*, decided by the High Court on 24th Sawan, 2001.

40. 9 J & K Law Reports 195 (FB).

41. *Supra* N. 36.

42. *Supra*, N. 40.

the mother. On merits it seems that under such circumstances it should be the mother but it cannot be inferred so in view of the full bench decision.

The right of a father is not confined to the making of only one daughter as *khana nashin* daughter. He can make, if he so chooses, several daughters as his *dukhtari khana nashin*.⁴³ The existence of a son does not affect the right of a father belonging to a Muslim agriculturist class to make his daughter a *dukhtari khana nashin*. Even in the presence of number of sons at the time of making his daughter a *dukhtari khana nashin*, a father has unrestricted power to make his daughter a *dukhtari khana nashin*.⁴⁴

Observance of ceremonies for appointing a Dukhtari Khana Nashin

No particular evidence is required to prove a daughter being a *dukhtari khana nashin* but those who rely on it must establish both its factum and validity in accordance with the custom in the valley.⁴⁵ The factum of a daughter being a *dukhtari khana nashin* can be established if it is proved by the evidence that the daughter continued to live at her father's house along with her husband from the day of her marriage. It is customary among Muslim agriculturists in the valley that after the marriage ceremony of a daughter who is married out of the family, she is taken to her conjugal home in a *doli* from her father's house. But when a *dukhtari khana nashin's* marriage is solemnized she must remain in her father's house and her *doli* must not be taken out of the house of her father. The daughter must continue to live in her father's house from the very time when ceremonies connected with her marriage are over at her father's house.⁴⁶ But it is not necessary that the marriage should be solemnized necessarily in her father's house. If for the sake of convenience the marriage is celebrated in the house of a relative or neighbour of the daughter's father, then after the completion of the marriage ceremony the daughter must immediately return to her father's house along with her husband. If she is taken out in *doli* from that house, she must be brought in the *doli* to her father's house and the *doli* must not

43. *Supra* N. 4., p. 112.

44. *Ibid.*

45. *Id.*, p. 139.

46. *Id.*, p. 141.

subsequently leave the house with daughter to take her to the conjugal home. The fact that daughter came to live with her father as a *dukhtari khana nashin* along with her husband subsequent to her marriage are circumstances in which she cannot be treated as *dukhtari khana nashin*.⁴⁷

The factum of the appointment of daughter as a *dukhtari khana nashin* can also be established by proving that *khana damad* was brought into the family prior to the marriage, the marriage expenses of the *khana damad* were meted by the father of the girl and that no marriage presents were brought by the *khana damad* at the time of his marriage.⁴⁸ These are the circumstances which if established should weigh heavily in the mind of the court to arrive at a conclusion of the factum of a daughter being a *dukhtari khana nashin*.

The validity of a daughter being a *dukhtari khana nashin* can be proved by establishing the competence of the person who confers upon her that status. It is the father of the girl alone and none else who can confer that status upon his daughter under the custom applicable in the valley.⁴⁹ Therefore, if a girl is given in marriage by any person other than her father and she continues to reside in father's house along with her husband from the date of her marriage, she cannot subsequently claim that she may be treated as *dukhtari khana nashin* of her father. Similarly, if a daughter is married out of home without giving her the status of a *dukhtari khana nashin* she cannot be conferred that status even though she may come to live along with her husband in her father's home.⁵⁰

The factum and validity of a daughter being a *dukhtari khana nashin* cannot be decided by a revenue court.⁵¹ Whenever such a question arises it is the duty of the revenue courts to ask the parties to agitate the matter in a proper civil court having jurisdiction to decide the issue. When a daughter seeks that she should be declared a *dukhtari khana nashin* and prefers a suit in a civil court, it

47. *Id.*, p. 142.

48. *Ibid.*

49. *Ibid.*

50. *Ibid.*

51. *Id.*, p. 144.

is essential for her to make a prayer for a declaration that she is a *dukhtari khana nashin*.⁵²

Effects of appointing a Dukhtari Khana Nashin

When a daughter is kept at home and a husband has been brought into the family for her she is treated as a son of her father or an equal with other sons of her father if there be any.⁵³ In the case of *Aziz v. Gani*⁵⁴, it was held that: "According to the customary law Mst. Fati as *dukhtari khana nashin* would be entitled to succeed to the property of Gaffar as an equal to a son." She is treated as a male lineal descendant of her father and can claim partition of her father's property in exactly the same manner as any other son or sons if the property was not divided.

The fact that a *dukhtari khana nashin* is to be considered as a male lineal descendant of her father does not mean that she is to be treated for the purpose of inheritance as a brother of her other brothers or a sister of her sisters. The changed status of the daughter is only in regard to the property she is to inherit from her father. She cannot, therefore, claim to succeed to her brother's property like a brother.⁵⁵ Same rule will apply to a case where a person appoints two daughters as *dukhtari khana nashin*, if one *dukhtari khana nashin* dies sonless, the inheritance lapses to the agnates of her father and does not go to the surviving *dukhtari khana nashin*.⁵⁶ The *dukhtari khana nashin* also cannot claim succession to the property of her deceased uncle on the contention that she is like a son for inheritance purpose and can succeed as a collateral.

The nature of the interest of a daughter who resides at her father's home with her husband is life interest only in the property inherited by her. This property goes to her sons, if there be any on her death. If she dies sonless, the inheritance lapses to the agnates of the father.⁵⁷ She is in no way entitled to alienate

52. *Id.*, p. 145.

53. *Id.*, p. 122.

54. 1936 PLR (J & K Section) 66 Per Dalal, C.J. and Sawhney, J.

55. *Ibid.*

56. *Ali Rather v. Habib*, 6 J & K Law Reports 1.

57. *Supra*, N. 30 in answer to question No. 62.

her immovable property to anyone except her own children. She can alienate her movable property by sale, gift, mortgage or bequest. When daughters inherit as *dukhtari khana nashin*, they succeed to all kinds of property of their deceased father whether it be movable or immovable, ancestral or self-acquired.⁵⁸

A *khana damad* is an heir to his deceased wife and succeeds to her property till his death or remarriage, whichever is earlier. On his death or remarriage, the property lapses to the agnates of his father-in-law. A *khana damad* is no heir to his father-in-law. Therefore, if a *dukhtari khana nashin* predeceases her father, the *khana damad* cannot claim inheritance of his father-in-law on his death.⁵⁹ Giving weightage to this custom, Mr. P. C. Mogha, the then Revenue Minister, in *Satar v. Noora*⁶⁰ observed: "A *khana damad* has under the law no inheritance. It is only *dukhtari khana nashin* who inherits the property of her father and on her death her husband can certainly inherit the property. But when she herself had died before Razak and did not inherit the latter's property, Noora could not claim any right of inheritance. Even if Mussamat Azizi had inherited the property and Noora had inherited on her death, he would have lost the right on remarriage."

After inheriting the property when *khana damad* dies, the property goes to his male issues in equal proportion. The issues of the *khana damad* from another wife do not inherit anything from this property. When the *khana damad* dies issueless, the property given reverts to the kinsmen of the father-in-law and not to the kinsmen of the *khana damad*.

When the natural father of the *khana damad* dies he does not inherit like brothers because he ceases to have connections with his paternal family when he is taken as *khana damad* in another family. A *khana damad*, however, inherits from his father provided his other brothers do not object to such succession.⁶¹

4. Findings of empirical study

As has been pointed out, a sample survey was conducted in

58. *Supra*, N. 53, p. 126.

59. *Id.*, p. 135.

60. Decided on 28th of *Sawan*, 1996.

61. *Ahad Bhat v. Ali Bhat*, decided on the 19th of *Bhadon*, 1995, *per* Raja Mohammad Afzal Khan, Revenue Commissioner.

the district of Anantnag in Kashmir valley on the familial rights of Muslim women with special reference to the appointment of a female heir and the rights of inheritance. The sample consisted of hundred households and an effort was made to include households belonging to various socio-economic groups. The profession wise break-up was : agriculturists 40, business community 15, professionals 35 and low castes 10. The sample of each category was fixed on the basis of assumed importance of each category with respect to the institution of *dukhtari khana nashin*. The broader findings of the survey are :

(a) *Incidents of custom*

The incidents of the custom can be discussed with respect to the families in which the institution of *dukhtari khana nashin* is prevalent and the compulsions which force families to give their sons as *khana damads*.

(i) *Profile of the family of dukhtari khana nashin*.—On the basis of Interview Schedule circulated/explained to the respondents, an effort was made to determine the incidence of the custom among the four strata purposively selected. The present study revealed that the incidence of the institution of *dukhtari khana nashin* is higher among illiterates and low income group and is lesser among educated and high income group. Table I indicates that highest frequency responses have come from agriculturists (85%) followed by low castes (50%) with no educational background and a meagre income. On the other hand, the members of the business community and professionals with educational background and good income rarely resort to the appointment of a *dukhtari khana nashin*. The members of these communities resort to this institution in exceptional circumstances, when the daughters suffer from physical disabilities or when the father is in employment and there is no one to look after his household.

The study also revealed that the appointment of a *khana damad* among agriculturists and low castes is made for the purpose of fulfilling social needs like perpetuation of the family, companionship of the parents when they grow old and to look after the

TABLE I

Profession-wise break up of households with history of khana damads

S. No.	Housholds	PROFESSION							
		Agriculturists		Business community		Professionals		Low castes	
		No. of Respondents	%age	No. of Respondents	%age	No. of Respondents	%age	No. of Respondents	%age
1.	With history of khana damads	34	85%	6	40%	14	40%	5	50%
2.	Without history of khana damads	6	15%	9	60%	21	60%	25	50%
	Total :	40	100%	15	100%	35	100%	10	100%

family property. The study further revealed that the agriculturists also make their daughters as *dukhturi khana nashin* in preference to adopted sons for themselves. The reason advanced by them for not adopting a son in presence of a natural born daughter is that an adopted son always remains suspicious about the natural born daughter of his adoptive father. The agriculturists, who are issueless, prefer to adopt daughters and bring *khana damads* for them. Therefore, the agriculturists generally prefer appointment of *khana damad* to adoption because the father of the girl receives a dredge, who works like a slave for many years.

(ii) *Profile of the natural family of khana damad.*—An attempt was made to determine socio-economic background of the *khana damads* with a view to assessing the magnitude of compulsions which force a male to live with a different family through the bond of marriage. With respect to the family background, the data (Table II) reveals that *khana damads* with agriculture, business, professions and low castes as family background are 61%, 100%, 20% and 8% respectively. Table III indicates that 67% of *khana damads* are from families which earn less than Rs. 300

TABLE II
Professionwise family background of khana damads

S. No.	Family Background	Frequency Response	Percentage
1.	Agriculture	36*	61.04%
2.	Business	6	10.16%
3.	Professionals	12*	20.33%
4.	Low castes	5	8.47%
	Total :	59	100%

* When compared with Table I, there is a variation. This variation is due to the fact that two professional households are having *khana damads* with agriculture as their family background.

per month, 25% which earn between Rs. 300-600 per month, and 6% which earn between Rs. 600-900. The large majority of *khana damads* are from families with small holdings in their possession. The data also reveals that highest incidence of giving a son as *khana damad* is among the agriculturists with less than five *kanals* of holdings in their hands by the income of which they could not

TABLE III

Income of khana damad's father's family

S. No.	Income per month	Frequency Response	Percentage
1.	Below Rs. 300	40	67.79%
2.	Rs. 301-600	15	25.42%
3.	Rs. 601-900	4	6.78%
4.	Rs. 901-above	—	—
Total:		59	99.99%

defray the marriage expenses of their sons. A natural corollary of the appointment of a daughter as *dukhtari khana nashin* is that the *khana damad* is brought permanently to live in the house of his father-in-law. The agriculturists are, therefore, generally very careful to select a person as *khana damad*, and it is observed that a suitable boy who does not generally have much to inherit from his father is brought into the family.

Agewise survey showed some interesting patterns (Table IV). The largest age-group of *khana damads* at the time of the solemnisation of the marriage is between 21 and 25 years constituting 69%. A little over 20% of *khana damads* are in the 15-20 age group and 10% are above 26 years. The highest incidence of the *khana damads* is from the age group of 21-25 years. This also testifies the fact that when the marriages of the sons are not performed by their fathers because of financial instability, they are given as *khana damads* by their fathers. It has been observed

that younger brothers are given as *khana damads* by their ungrateful elder brothers so that they could take the shares of their younger brothers.

TABLE IV

Age of khana damads at the time of marriage

S. No.	Age-Groups	Response Frequency	Percentage
1.	15-20 years	12	20.33%
2.	21-25 years	41	69.49%
3.	26 years and above	6	10.16%
	Total :	59	99.98%

(b) *Mode of appointment of Khana Damads*

An attempt was also made to determine the various modes of appointments of *khana damads*. Asked about the mode of appointment of *khana damads* responses showed (Table V) that in little over 84% cases there was a formal deed between the *khana damad* and the prospective father-in-law providing that in case the boy runs away from the matrimonial home he shall defray the marriage expenses. It has been observed that in majority of the cases there is a formal deed between the *khana damad* and the prospective father-in-law and in some cases (15%) it is mentioned in the *nikah nama* that the daughter is married as a *dukhtari khana nashin*. The *khana damad* by agreement undertakes to pay the amount of marriage expenses incurred by his father-in-law in case he leaves the parental home of his wife. This is not opposed to the policy of agriculturists. When an agriculturist brings a *khana damad* for his daughter, he has to undergo expenses for the marriage. The *khana damad* has to incur nothing. The father-in-law has to make provision for everything both for his *khana damad* and for daughter kept at home. In fact *khana damad* is brought as a son in the house. If the *khana damad* repudiates his *khana damadi*

TABLE V

Mode of appointment of khana damads

S. No.	Mode of Appointment	Response Frequency	Percentage
1.	Deed between <i>khana damad</i> and Father-in-Law	50	84.74%
2.	Stipulation in <i>nikah nama</i>	9	15.25%
	Total :	59	99.99

and subsequently decides to leave the parental home of his wife and to take his wife along with him or runs away from there without any rhyme or reason and does not maintain his wife and perform his matrimonial obligations, he upsets the whole arrangements of the family and of the house. On the happening of such a contingency or in such a situation which is so vexing both for his wife and for his father-in-law if he is called upon to pay the amount undertaken by him to pay, it cannot be said that such terms are opposed to the public policy. The reason advanced is that a *khana damad* puts himself voluntarily under a customary obligation to live in his father-in-law's house permanently, for that solves many of the problems of the family. He himself enjoys some amenities. He has not to bother about his wife's maintenance. Therefore, if a *khana damad* binds himself to pay specified sum as token money spent by his father-in-law on the marriage on his running away from the house and deserting his wife, then on the happening of such contingency, he is called upon to pay the specified sum.

Table VI gives an analysis of responses on time lag (probation) between migration of prospective *khana damad* in bride's family and the date of the solemnisation of his marriage. It is revealing to find that 94.9% *khana damads* migrated to the prospective father-in-law's house 2-3 years prior to the date of marriage. If the boy is found to be suitable in all respects during the period of his probation, he is wedded to the daughter and kept in the household as a *khana damad*.

TABLE VI

Time Lag Between Migration of Khana Damad in Bride's Family and Date of Marriage

S. No.	Gap Between Migration and Date of Marriage	Response Frequency	Percentage
1.	1-2 years	2	3.38%
2.	2-3 years	56	94.91%
3.	3 years and above	1	1.69%
	Total :	59	99.98%

(c) *Respondents evaluation of the institution of Dukhtar Khana Nashin*

Although the institution of *dukhtari khana nashin* is widely practised, an attempt was made to secure respondents evaluation with regard to the utility of the customary law. For this purpose an Interview Schedule was circulated/explained to various classes of respondents on the basis of which tentative findings have been arrived at. Table VII reveals that repugnance to the institution of *dukhtari khana nashin* among low castes is 0%, agriculturists 2.5%, business community 20% and professionals 40%. The

TABLE VII

Profession-wise Repugnance to the Institution of Dukhtari Khana Nashin

S. No.	Profession	No. of Respondents	%Age showing Repugnancy	%Age showing Consistency	Total
1.	Agriculture	40	2.5%	97.5%	100%
2.	Business	15	20%	80%	100%
3.	Professionals	35	40%	60%	100%
4.	Low castes	10	—	100%	100%

incidence of the repugnance to the institution of *khana damad* among low castes and agriculturists is lower as compared to businessmen and professionals. This is perhaps due to the fact that businessmen and professionals with educational background are aware of the fact that according to the *Shariat* a Muslim cannot get a *khana damad* to live with him. They, therefore, look upon this institution with disfavour as it is opposed to the tenets of Islam. One judge in the course of the survey told the investigator that his repugnance to the institution is because "*khana damadi* is unislamic and opposed to basic human values as the institution either way is turned into slavery".

Among the respondents (Table VIII) who happened to come in the sample covered under the survey, 100% agriculturists, 80% businessmen, 74% professionals and 90% low castes indicated that the basis of the appointment of a *khana damad*, in the absence of it under *Shariat*, is the local custom. However, 13% businessmen, 14% professionals and 10% low castes stated that the basis of it is the general custom of the Muslims. Of the remaining business

TABLE VIII

Professionwise Responses Regarding Basis of Appointment of Khana damads

S. No.	Profession	No. of Respondents	Basis of Appointment				Total
			Local custom	General custom of Muslims	Shastric Law of Hindus	Any other	
1.	Agriculture	40	100%	—	—	—	100%
2.	Business	15	80%	13.33%	6.66%	—	99.9%
3.	Professional	35	74.28%	14.28%	5.71%	5.71%	99.98%
4.	Low Castes	10	90%	10%	—	—	100%

and professional respondents, 6% and 5% respectively stated that the basis of it is *Shastric* law of Hindus. A little over 5% professionals stated that the basis of it is the Jewish law. A substantial majority of the agriculturists, businessmen, professionals and low castes indicated that the basis of the appointment of a *khana damad* is the local custom. However, few businessmen, professionals and low castes regard general custom of the Muslims as the basis of appointing a *khana damad*.

The present study further revealed that *khana damads* are made to work like serfs and are always asked to remain at the beck and call of their fathers-in-law and mothers-in-law. The *khana damads* complain that some men are unscrupulous in the matters of *khana damadi*, and turn boys out when they are on probation on small pretext and give their daughters in marriage to a stranger. But as a rule, the boy who works out the term of probation gets his bride. It seems that there is apparently no legal obligation either on the part of the father of the girl or the *khana damad* and a connection can be broken at the will of either party. But there is moral obligation on the part of the boy to work and on the part of the prospective father-in-law to give his daughter in marriage to the boy. Old men complain that the rising generation is becoming very independent, and that the *khana damad* is always inclined to leave his father-in-law's house soon after the marriage.

The survey also revealed some interesting facts with regard to the consent of *dukhtari khana nashin* for the appointment of *khana damads*. The majority (85%) of *khana nashin dukhtars* complained that their consent was not taken by their fathers at the time of appointments of *khana damads* and in such cases the consent of the girl has been taken for granted. The consent of the girl has been taken in few cases. The main considerations in such cases which made the girls give their consent were the companionship for parents, supervision and control of the family property.

With regard to the principle of equality of sexes in matters of succession, data (Table IX) reveal that 100% professionals plead for equal share for sons and daughters, 90% agriculturists plead for equal shares and 10% plead for Koranic shares, 80% businessmen plead for equal shares and 20% are for Koranic shares, 60%

TABLE IX

Professionwise Responses with Regard to Shares to be Allotted to Children Sexwise in Matters of Succession

S. No.	Shares to be Allotted	Profession			
		Agriculture	Business	Professionals	Low Castes
1.	Equal share for sons and daughters	90%	80%	100%	60%
2.	Koranic share for sons and daughters	10%	20%	—	20%
3.	More share to daughters than sons	—	—	—	20%
	Total:	100%	100%	100%	100%

low castes are for equal shares, 20% are for Koranic shares and 20% plead for more shares to daughters than sons. It seems that the Muslims of the district of Anantnag are vanguards of Muslim law reform because a substantial majority (89 respondents out of 100) indicated that there should be equal shares for sons and daughters. It is interesting to note that the Muslims of the district adore the doctrine of equality of sexes in regard to succession. It is also revealing to find that the low caste Muslim fathers are very much attached to their daughters because some of them have gone to the extent of pleading more shares for daughters than sons. Thus Muslims in respect of rights of inheritance show much consciousness than their brethren in other parts of the country.

5. Conclusion

The order of succession under customary law in Kashmir is *agnatic* with the result that for succession to agricultural land females are excluded from inheritance. The customs relating to succession were borrowed by Muslims from Hindus, and Muslims

retained these customs even after their conversion to Islam. Immediately after independence the social reformers in India directed their attention to bringing about changes in the Hindu law of succession which operated harshly against the Hindu females. The Jammu and Kashmir Hindu Succession Act, 1956 abrogated these customs and made the position of Hindu females secure in matters relating to succession and in fact equated females with males.⁶² The discrimination between males and females was done away with. If these customs have been found wanting in so far as Hindus of the State are concerned, one would have expected their abrogation for Muslims also. In fact retention of these customs is not supported by the personal laws of any of the communities in India. In their essence these are harsh, unreasonable and in any case inconsistent with the spirit of the Constitution of India as they clearly discriminate between females and males on the ground of sex.

The stranglehold of customs negates all attempts to improve the socio-economic condition of Muslim women in Kashmir, the majority of whom are illiterate. If social and economic necessity were at all to decide the issue, customary law would by now have been changed to remove all social handicaps peculiar to Muslim women to enable them to enjoy all rights guaranteed to them by the Constitution. Considering that the rest of the country has gone ahead with far-reaching social reforms, the continuance of age-old customs, which relate to a bygone era and have no relevance today, can only be seen as the result of a foolhardy attempt to isolate and segregate a section of the people who form an integral part of the country. If we are true to the ideals, letter and spirit of our Constitution, customary law as it exists in Kashmir valley should not be allowed to operate indefinitely where it is the source of inequality and hardship to the people.

The spirit of times has changed. The society being dynamic, old customs need to be replaced by enlightened legislation with the object of achieving uniformity and equality in matters relating to succession. The institution of *dukhtari khana nashin*

62. On the model of Hindu Succession Act, 1956 enacted by the Parliament.

looks obnoxious and repugnant to the concept of equality. This institution which has the effect of depriving the other daughters, mother, widow, sisters and son's widow of the propositus from inheritance, seems to be unjust and is fraught with many dangers. An enactment which abrogates these customs and does substantial justice between females *inter se* will be feasible and in consonance with the changing social milieu.

MUSLIM DIVORCEE'S RIGHT TO MAINTENANCE : RECENT JUDICIAL TRENDS IN INDIA

LALITA PARIHAR

Introduction

In view of the avowed policy of the founding fathers of the Constitution to strive to make Uniform Civil Code for all sections and classes of the citizenry, legislative competence for unification of the personal laws and their adaptation to the needs of the community was given by Item V of the Concurrent List.¹

Since the setting up of the First Law Commission the propriety and relevance of codifying personal laws has been a predominant occupation with law reformers of India. The Second Law Commission expressly negated the notion of codification; the recommendation was more based on political expediency than a rational solution to the evasive problem. In almost all the modern and secular societies the personal laws relating to marriage, divorce, legitimacy, adoption, succession and maintenance are matters of crucial concern for healthy growth of a nascent community. Secular codes exist in Continental Europe which more or less lay down a common family law in such vital matters for all sections of the community.

It has been rightly remarked that there is hardly any recorded system of ancient law in which there has not been a mix-up of religion and law. In England and Continental Europe the Church interfered in all such matters as today are governed by a secular

* LL. M (Alig.), Reader in Law, University of Jammu, Jammu (Tawi).

1. "b2 Criminal procedure, including all matters included in the Code of Criminal Procedure at the commencement of this Constitution"....
"c5 Marriage and divorce, infants and minors; adoption; wills, intestacy and succession; joint family and partition all matters in respect of which parties in judicial proceedings were immediately before the commencement of this Constitution subject to their personal law....."

code of laws ; this disentanglement of religious from secular activities has been brought about slowly but surely and the secular arm of society has taken care of matters essential for the healthy growth of a family. It is one of the social interests of a modern civilized society that all efforts must be made to strengthen the family. Matters relating to conclusion and dissolution of marriage are looked upon as essentially secular matters needing the intervention of the State. Likewise, the right of a woman to share economic opportunity and defend herself against an inequitable social system is the foremost secular concern of the modern times. The founding fathers of our young Republic while granting the right to freedom of religion also took care to ensure that certain activities heretofore deemed as religious are brought within the competence of the secular arm of the society.

In early fifties under the leadership of Prime Minister Nehru the Parliament took up the task of codification of the Hindu Law in spite of the stiff resistance of orthodox sections of the Hindu community. The purpose was not only to codify the law contained in the *Shastras* and the judicial decisions ; the crux of the legislative activity was to adapt the law to the needs of a modern society. The Parliament enacted laws on succession, marriage, adoption and maintenance. There has been a persistent demand from some quarters vehemently opposed by orthodox sections of the Muslim community that the Muslim personal law also needs adaptation to meet the challenges of the modern times. In a democratic society there are numerous considerations for ushering in legislative reforms in matters of family law. It is generally agreed that the proposals for the reform should emanate from the community concerned and nothing should be imposed from above.

Maintenance of a person is a matter of social importance, particularly for a woman who in the existing social and economic set-up in our country continues to be a weaker section of the society. Although personal laws of Hindu and Muslims do contain rules for the maintenance of women, the criminal law enacted as far back as 1898 also imposed duties on fathers and husbands to maintain children or the wife. Section 488 of the Criminal Procedure Code of 1898 contained provisions for main-

tenance of one's wife or his legitimate or illegitimate child unable to maintain itself. It read as under :

If any person having sufficient means neglects or refuses to maintain his wife or his legitimate or illegitimate child unable to maintain itself, the District Magistrate, a Presidency Magistrate, a Sub-Divisional Magistrate or a Magistrate of the first class may, upon proof of such neglect or refusal order such person to make a monthly allowance for the maintenance of his wife or such child, at such monthly rate, not exceeding five hundred rupees in the whole, as such Magistrate thinks fit, and to pay the same to such person as the Magistrate from time to time directs.

The Code was revised in 1973 to redefine the duties in this regard and to provide efficacious remedies to the beneficiaries under the law. Section 125 of the new Code is a benign provision enacted to ameliorate the economic condition of neglected wives and divorcees. The purpose of this section is to provide remedy against neglect. After all no civilized society will tolerate moral abandonment or starvation of women. One of the cardinal points of difference between the law contained in the Criminal Procedure Code and the traditional Islamic law is that the right to maintenance is available not only to neglected wives but also to a woman who has been divorced by, or has obtained a divorce from, her husband and has not remarried. The conflict between the new law and the traditional Islamic law on divorced woman's rights has generated a lot of litigation. Decisions of the Supreme Court trying to solve the conflict in favour of the Criminal Procedure Code and in supersession of the Muslim personal law have become highly controversial. The traditionalists rely on revealed Muslim Law, superiority of traditions, limited interpretative value of human effort, merit of knowledge of affairs human and divine, capability of the learned scholars to deny legitimacy to human institutions like parliament or judiciary to make changes. The protagonists rely on incongruities of contemporary social life, social disabilities and exploitation of women and secular nature of the polity. The apparent conflict between the two views requires close analysis to ascertain the scope of the statutory provisions with regard to Muslim ex-wife's right to claim maintenance from her husband under Criminal Procedure Code.

Maintenance Provisions Relating to Muslim Divorcees under Criminal Procedure Code

Strictly speaking, provisions for maintenance to dependent wives, children and parents do not fall within the ambit of Criminal Procedure. However, in the interests of social justice Sections 125 and 127^{1a} Cr.P.C. provide for speedy and inexpensive remedy to dependent wives, children and parents for obtaining

1a. Section 125 reads:

- (i) If any person having sufficient means neglects or refuses to maintain (a) his wife, unable to maintain herself, or (b) his legitimate or illegitimate minor child whether married or not, unable to maintain itself, or (c) his legitimate or illegitimate child (not being married daughter) who has attained majority whether such child is, by reason of any physical or mental abnormality or injury unable to maintain itself, or (d) his father or mother unable to maintain himself or herself, a magistrate of the first Class may, upon proof of such refusal, order such person to make a monthly allowance for the maintenance of his wife or such child, father or mother, at such monthly rate not exceeding Rs. 500 in the whole as such Magistrate thinks fit, and to pay the same to such person as the Magistrate may from time to time direct: Provided that the Magistrate may order the father of a minor female child referred to in clause (b) to make such allowance until she attains her majority, if the Magistrate is satisfied that the husband of such minor female child if married is not possessed of sufficient means.

Explanation.—For the purpose of this sub-section—

- (a) "minor" means a person who, under the provisions of the Indian Majority Act, 1875 is deemed not to have attained his majority,
 (b) "wife" includes a woman, who has been divorced by, or has obtained a divorce from her husband and has not remarried.
 (ii) Such allowance shall be payable from the date of the order, or if so ordered, from the date of the application for maintenance.
 (iii) If any person so ordered fails without sufficient cause to comply with the order, any such Magistrate may, for every breach of the order, issue a warrant for levying the amount due in the manner provided for levying fines, and may sentence such person, for the whole or any part of each month's allowance remaining unpaid after the execution of the warrant to imprisonment for a term which may extend to one month or until payment if sooner made.

Provided that no warrant shall be issued for the recovery of any amount due under this section, unless application be made to the court to levy such amount within a period of one year from the date on which it became due:

Provided further that if such person offers to maintain his wife on condition of her living with him, such Magistrate may consider any grounds of refusal stated by her, and may make an order under this section notwithstanding such offer, if he is satisfied that there is a just ground for so doing.

maintenance. Section 125 of the Code of Criminal Procedure, 1973 (corresponding to Section 488 of the old Code of 1898) empowers a magistrate to order payment of maintenance to wives, minor children and parents. Sub-section (1) of this section

Explanation.—If a husband has contracted marriage with another woman or keeps a mistress, it shall be considered to be just ground for his wife's refusal to live with him.

- (iv) No wife shall be entitled to receive an allowance from her husband under this section if she is living in adultery; or if without any sufficient reason, she refuses to live with her husband or if they are living separately by mutual consent.
- (v) On proof that any wife in whose favour an order has been made under this section is living in adultery, or that without sufficient reason she refuses to live with her husband, or that they are living separately by mutual consent, the Magistrate shall cancel the order.

Section 127 lays down procedure for alteration in allowance—

- (1) on proof of a change in the circumstances of any person, receiving under Section 125 a monthly allowance, or ordered under the same section to pay monthly allowance to his wife, child, father or mother, as the case may be, the Magistrate may make such alteration in the allowances as he thinks fit:

Provided that if he increases the allowance, the monthly rate of Rs. 500 in the whole shall not be exceeded.

- (2) Where it appears to the Magistrate that, in consequence of any decision of a competent Civil Court, any order made under Section 125 should be cancelled or varied, he shall cancel the order, as the case may be, vary the same accordingly.
- (3) Where any order has been made under Section 125 in favour of a woman who has been divorced by, or has obtained a divorce from her husband, the Magistrate shall, if he is satisfied that—
 - (a) the woman has, after the date of such divorce, remarried, cancel such order as from the date of her remarriage,
 - (b) the woman has been divorced by her husband and that she has received, whether before or after the date of the said order, the whole of the sum which, under any customary or personal law applicable to the parties, was payable on such divorce, cancel such order.
 - (i) in the case where such sum was paid before such order from the date on which such order was made,
 - (ii) in any other case, from the date of expiry of the period, if any, for which maintenance has been actually paid by the husband,
 - (c) the woman has obtained a divorce from her husband and that she had voluntarily surrendered her rights to maintenance after her divorce, cancel the order from the date thereof.
- (4) At the time of making any decree for the recovery of any maintenance or dowry by any person, to whom a monthly allowance has been ordered to be paid under Section 125, the Civil Court shall take into account the sum which has been paid to, or recovered by, such person as monthly allowance in pursuance of the said orders.

defines the liability of a husband to maintain his wife unable to maintain herself or his legitimate or illegitimate minor child unable to maintain itself. It lays down that a person having sufficient means will be liable to pay separate maintenance to his wife and children if it is shown that he has neglected or refused to maintain his wife and legitimate or illegitimate child unable to maintain itself. This section also imposes a limit on the powers of the magistrate in the fixation of the monthly allowance. The true meaning of the ceiling came up for determination before the Supreme Court of India,² two interpretations of the provisions were possible: (a) that the maintenance ordered to be paid by any one person to any number of claimants should not exceed Rs. 500 p.m., irrespective of that person's financial position, or (b) that the maintenance ordered to be paid to any one person should not exceed Rs. 500 p.m. the ceiling being with reference to the payee and not for the payer. The Supreme Court adopted the second interpretation holding that the first interpretation if accepted would lead to "absurdities", and to an "obvious jurisdictional inequity", and the court described Section 125 as a "reincarnation" of Section 488 of the old Criminal Procedure Code and explained that since it was a measure of social justice falling within the "constitutional sweep of Article 15(3) reinforced by Article 39" the "brooding presence of the constitutional empathy for the weaker sections like women and children must inform interpretation if it has to have social relevance."³

Explanation (b) of Section 125 of the Code provides a new definition of 'wife'. The term 'wife' includes a woman who has been divorced by, or has obtained divorce from, her husband and has not remarried. "This extended definition of 'wife' has been considered necessary in view of the existence of some personal laws permitting a husband to divorce his wife at any time at his will. The inclusion of 'divorced wife' in the definition of 'wife' is intended to prevent unscrupulous husbands frustrating the legitimate maintenance claims of their wives by just divorcing them under their personal laws in our society. This causes special hardship to the poorer sections of the community who

2. *Ramesh Chander v. Veena Kaushal*, (1978) 4 SCC 70.

3. *Ibid.*, p. 75.

become helpless. The amendment made by the Committee is aimed at securing social justice to women belonging to the poorer classes'.⁴

The relationship of this law with the civil laws of maintenance has been a controversial matter ever since the enforcement of the new Code. The proposed Bill met with stiff resistance from the Muslim members of the Lok Sabha.⁵ The Muslim members of the House objected to the explanation clause, as it was opposed to Muslim concept of marriage and divorce. These Muslim members contended that the Explanation be deleted from the Bill or alternatively, that Muslims should be exempted from the ambit of these provisions as it interfered with Muslim Personal Law. The members' objection was rejected and the Law Minister defended the bill on the ground that the Explanation in Section 125 did not affect the civil status of the husband, wife or ex-wife in any way. Although it might have appeared as it did to the opposition members and to the Muslim leaders that the effect of the revised Section 127(3)(b) was to exempt Muslims from the provisions of Section 125 as they applied to divorced wives once payment of the dower due on termination of marriage by divorce were proved, the matter did not end here. The Law Minister stated:

We have received a lot of representation which shows that after divorce women are generally in a very bad plight and it is a very difficult social and humanitarian problem.... I do not think that Muslim Personal Law comes into the picture.⁶

The section was passed by the Lok Sabha with the Explanation intact. However, an exception was added in the form of Section 127(3)(b). It provides that a magistrate shall cancel the order for maintenance made under Section 125 of the Code if any sum under any customary or personal law applicable to the parties is paid in full on divorce. An opposition member⁷ opposed

4. Report of the Joint Committee on the Code of Criminal Procedure Bill, presented to the Rajya Sabha on 4-12-1972, p. XIII.
5. Mr. Ibrahim Sulaiman Seth and C. H. Mohd. Koya objected against the Explanation of Section 125(1)(b).
6. *Lok Sabha Debates*, Vol. (31), August 30, 1973, Cols. 235—239, 316—318.
7. Mr. J. Basu cited petitions received from Muslim women and the Delhi City Women's Association in support of the contentions.

the exception and in defence of the provisions of Section 125 which, as they applied to Muslim women, appeared to be negated by the amendment proposed to Section 127, he invoked the provisions of the *Quran*. "For divorced women, maintenance should be provided on a reasonable scale,"⁸ and suggested that the amendment to Section 127 had been a political amendment occasioned by political considerations.⁹ The amendment of Section 127 was accepted by the Lok Sabha.¹⁰ Even in 1980 a private member's Bill aimed at the amendment of the maintenance law under the Criminal Procedure Code, 1973 proved abortive.¹¹

Judicial exposition of the provisions with regard to Muslim divorcees

It is the duty of the courts to interpret the meaning and scope of legislation and the lurking ambiguity in terms of the statute virtually guaranteed that the question would arise in litigation. On this provision of the Criminal Procedure Code, the most important judicial decision, perhaps of several decades in the field of Muslim Law, is the judgment of the Supreme Court in *Bai Tahira v. Ali Hussain Fissali Chothia*¹². In this case the

8. *Quran*, Surah II, Verse 241.

"Men are the protectors and maintainers of women, because God has given the one more strength than the other, and because they support them from their means...." (*Surah IV Verse 34* (The Holy *Quran*) Tr. by Abdullah Yussuf Ali, p. 190).

9. *Lok Sabha Debates*, Vol. (34), Dec. 11, 1973 Cols., pp. 312-313.

10. *Ibid.*, Col. 318.

11. Bill No. XVI of 1980 moved in the Rajya Sabha by Syed Shahabuddin, M.P. in order to remove the discrepancy between Sections 125 and 127 of the Criminal Procedure Code and the Muslim personal law. Another similar bill, moved by G. M. Bantawala, M. P., also failed.

12. (1979) 2 SCC 316: wherein Ali Hussain had married Tahira as his second wife in 1956 and a few years later had a son by her. The initial warmth vanished and the jealousies of a triangular situation erupted, marring mutual affection. A suit relating to the flat in which Ali Hussain had housed Tahira ended in a consent decree which recited that the husband had transferred the suit premises, namely, a flat in Bombay to Tahira along with the shares of the cooperative housing society which had built the flat. Dower (Rs. 5,000) and Idat (Rs. 180) were stated to be adjusted by the compromise terms which concluded "the plaintiff declares that she has no claim or right whatever against the defendant or against the estate or properties of the defendant". Some years later, finding herself in financial straits, Tahira filed an application under Section 125 of Cr.P.C., 1973 for maintenance. The magistrate while taking due note of the means of the husband and the fact that the cost of living in Bombay

Supreme Court had to determine, so far as a Muslim woman was concerned, the content of the expression, "the sum which under any personal law of the parties was payable on divorce" occurring in Section 127(3)(b) of the Code of Criminal Procedure, 1973. The court held that on a simple reading of Explanation (b) to Section 125(1) of the Code it is clear that every divorced wife, otherwise eligible, is entitled to the benefit of maintenance allowance and the dissolution of marriage makes no difference to the right under the current Code.¹³ Regarding the application of Section 125, Krishna Iyer, J. observed :

Section 125 requires, as a *sine-qua-non* for its application, neglect by husband or father. Moreover the husband has not examined himself to prove that he has been giving allowances to the divorced wife. His case on the contrary is that she has forfeited her claim because of divorce and the consent decree. Obviously he has no case of non-neglect. His plea is his right to ignore. So the basic condition of neglect to maintain is satisfied.¹⁴

The court held that the terms of the consent decree could not negate a claim which was not at that time available to the ex-wife but which had been conferred upon her by the statute.¹⁵ The husband argued, *inter alia*, that the consent decree of 1962 had absolved him from any further obligation towards the woman who had been his wife and by implication that payment of the sum of Rs. 5,000 as dower had satisfied the terms of Section 127(3)(b). Delivering the judgment of the court, Krishna Iyer, J.

where the parties lived was high, as well as the fact that the husband had provided residential accommodation to Tahira, awarded a monthly allowance of Rs. 300 for her son and Rs. 400 for Tahira. This order was challenged before the sessions judge by the aggrieved husband, who on a strange view of the law that the court under Section 125 had no jurisdiction to consider whether the applicant was a wife, dismissed the petition in allowance of the appeal. The High Court deigned to bestow little attention on the matter and summarily dismissed the revision petition. This led to the appeal by special leave before the Supreme Court.

13. *Ibid.*, p. 319.

14. *Ibid.*, p. 320.

15. The consent decree of 1962 in this case resolved all disputes and settled all claims then available. But a new statutory right created as a projection of public policy by the Code of 1973, could not have been in the contemplation of the parties when in 1962 they entered into a contract to adjust their then mutual rights.

invoked Articles 15(3), 37, 38, 39 of the Indian Constitution in interpreting the provisions of the new Code and observed :

Article 15(3) has compelling, compassionate relevance in the context of Section 125 and the benefit of doubt, if any, in statutory interpretation belongs to the ill used wife and the derelict divorcee. This social perspective granted, the resolution of all the disputes projected is easy. Surely, Parliament, in keeping with Article 15(3) and deliberate by design, made a special provision to help women in distress cast away by divorce. Protection against moral and material abandonment manifest in Article 39 is part of social and economic justice, specified in Article 38, fulfilment of which is fundamental to the governance of the country (Article 37).¹⁶

In the landmark decision in *Bai Tahira*, the Supreme Court in no uncertain terms held that no husband can claim under Section 127(3)(b) of the Code an absolution from his obligation under Section 125, towards a divorced wife "except on proof of payment of sum stipulated by customary or personal law whose quantum is more or less sufficient to do duty for maintenance allowance".¹⁷ The court made it clear that "the payment of illusory amounts by way of customary or personal law requirement will be considered in consideration of maintenance rate but cannot annihilate that rate unless it is a reasonable substitute. The purpose of the payment under any customary or personal law must be to obviate destitution of the divorcee and not to provide her with wherewithal to maintain herself. The whole scheme of Section 127(3)(b) is manifestly to recognise the substitute maintenance arrangement by lump sum payment organised by the custom of the community, or the personal law of the parties. There must be a rational relation between the sum so paid and its potential as provision for maintenance, to interpret otherwise is to stultify the project".¹⁸

Though this decision of the Supreme Court is progressive and gives a helping hand to divorced wives having no adequate provision for maintenance, some orthodox Muslims felt that the deci-

16. *Supra* n. 14.

17. *Ibid.*, p. 321.

18. *Ibid.*, p. 321.

sion was making an inroad into their customary personal law and thereby it was an encroachment upon their freedom of religion. They protested against this decision. This decision in the prevailing conditions may have far reaching consequences. One would only hope that the needy divorced wives are not deprived of their legitimate succour provided by socially responsive judicial process.

The Supreme Court in clear and unambiguous language declared that the overriding social policy of the secular welfare State protected the "derelict divorcee" whatever her religious denomination, unless personal law had already granted her such protection against moral and material degradation as the courts considered adequate in the circumstances of the case. Krishna Iyer, J. observed :

The scheme of the complex of provisions in Chapter IX has a social purpose. Ill used wives and desperate divorcees shall not be driven to material and moral dereliction to seek sanctuary in the streets. This traumatic horror animates the amplitude of Section 127. Where the husband, by customary payment at the time of divorce, has adequately provided for the divorcee, a subsequent series of recurrent doles is contraindicated and the husband liberated. This is the teleological interpretation and the sociological decoding of the text of Section 127.¹⁹

Under Section 127(3)(b) of the Code, a maintenance order passed in favour of a divorced wife "shall" be cancelled if under the customary or personal law applicable to the parties, "the whole of the sum payable on such divorce" has been paid to her by her husband whether before or after passing of the order. Subjecting the text of this provision to "teleological interpretation and sociological decoding",²⁰ the Supreme Court read in between its lines the requirement of reasonable adequacy of the sum payable under personal or customary law, unless there was a "rational relation between the sum paid and its potential as provision for maintenance". The court held Section 127(3), would not apply.²¹ In view of how Muslim law relating to marriage and divorce is being actually understood and applied in this country, the ruling

19. *Ibid.*, p. 321.

20. *Ibid.*

21. *Ibid.*, p. 321.

must be appreciated. However, the law is certainly being misunderstood and misapplied. The very concept of marriage in Islam has become distorted. It was this distorted view that was given expression to when it was observed in an old Madras decision that on marriage a Muslim daughter "passes over to her husband's family" and that then there is no obligation on the members of her natural family to maintain her, even if she is divorced".²² Actually the fact is otherwise. In Muslim Law neither there is any inter-familial transfer of the girl on marriage nor is the family of her birth wholly absolved from maintaining her in all circumstances. During her *idaat* a divorced girl is of course to be maintained by her former husband who must also pay her *mahr* in full if not already paid. After the expiry of *idaat* the liability to maintain her, if she is destitute, reverts to her parents' family and for this purpose she is treated as an unmarried girl. Of course Islam directs the divorcing husband to pay the unpaid dower, stipulated or unstipulated as the case may be, and maintenance of *idaat* to the wife, but it does not keep him tagged to her for the rest of his life. Keeping him free to look after his own liabilities, it makes alternative arrangements for the divorced wife in case she needs it even after the payment of *mahr* and *idaat*.²³ But this verse does not fix any period for maintaining the divorced wife. If the traditional concept of waiting period is examined, it will be noticed that the wife is disabled from marrying during the period and so the husband is liable to maintain the ex-wife.²⁴ It is a small and necessary extension of the traditional concept if maintenance is extended up to the remarriage of the divorcee. This will be in conformity with the *Quranic* verse. If Muslim husbands, Muslim

22. *Pakrichi v. Kunhacha*, (1911) 36 Mad 385.

23. "As for as the principle relating to parents' liability to maintain divorced (as also widowed) daughter is concerned, several texts e.g. the *Fatawa-E-Qadi Khan* clearly say that among those whom a person must maintain are his daughters, who have attained puberty (*Bulugh*) whether they are *bakira* or *Sayeba*" (while *bakira* means an unmarried girl, *sayeba* in the context of maintenance of widowed daughter) as quoted in Muhammad Yusoff: *Mahammedan Law relating to Marriage, Dower, Divorce, Legitimacy and Guardianship of minors according to Soonnees*, Vol. II, 1895, p. 239.

24. "For the divorced woman maintenance should be granted on a reasonable scale. That is the duty of the righteous". (Chap. II, Verse 241 of the *Holy Quran*).

wives and Muslim parents can show by their conduct a correct understanding of Islamic concept of marriage and divorce, and if the law of Islam can be usually and properly applied in the country, the courts will not be constrained to interpret Section 127(3)(b) of the Cr.P.C. with a "compassionate expansion of sense" which the Supreme Court laid down in *Bai Tahira's* case.

Bai Tahira's case has generated a mixed reaction. Daniel Latifi has forcefully supported the decision of the Supreme Court in *Bai Tahira*. He said that the judgment was "entirely consistent with the verse of the Holy *Quran*" and that since it restored to the Muslim woman her *Quranic* rights, "everyone who is a votary of the Holy *Quran* shall applaud it". The judgment also in his view "is in conformity with the opinion of Imam Shafei, Saeed Bai Jubair and other elders."²⁵ In support of his assertion he had referred to the commentaries on the *Quran* by Ibn Kathir and Allama Baydawi.²⁶ Dr. Tahir Mahmood has observed that: "The Supreme Court decision in *Bai Tahira* is a liberal ruling and conforms to the spirit of Islamic law on the subject".²⁷ Syed Amenul Hasan Rizvi referring to the opposition of the principle of Section 125 of the Code of Criminal Procedure during the parliamentary debates on it, said: "The conflict that had arisen between the Islamic Law and the Code of Criminal Procedure was resolved by the insertion of clause (b) of sub-section (3) of Section 127 of the Code. However, the conflict has been relivened by the Supreme Court through its judgment in *Bai Tahira's* case." The burden of Rizvi's arguments at the Seminar was that, though the interpretation of Section 127(3)(b) made in *Bai Tahira* could not get support from the *Quranic* verse on *mata-i-talaq*, proper legislation could be enacted to enable the courts to make use of that verse for redressing the grievances of divorced women in suitable cases. He concluded:

Having stated the position of divorced wife's right to maintenance according to *Sharia*, I would like to share an idea with the

25. The extract given here is based on Daniel Latifi's discussion at a seminar conducted by the Department of Islamic and Comparative Law (*Indian Institute of Islamic Studies, New Delhi*) and on his contribution on Muslim Law to *XIV Annual Survey of Indian Law* 139-143 (1978).

26. *Ibid.*

27. Mahmood, Tahir: *The Muslim Law of India*, p. 130 (1980).

distinguished gathering. I have framed a hypothetical question which is: Suppose an Islamic State makes a law through which a right is conferred on the divorced woman to move the court of law for a decree in her favour for awarding to her the *mata-i-talaq* to be paid by her former husband as envisaged by the *Quran*. The law leaves it to the discretion of court whether or not to award her the *mata* and also the quantum and mode of payment of it. Will such a legislation be against the *Sharia*? In my humble opinion such a legislation will not conflict with the *Sharia* and will be valid. I have already consulted a few *Ulama* who have endorsed my opinion in the matter.²⁸

The Supreme Court has confirmed the *Bai Tahira* case in *Fuzlunbi v. K. Khader Vali*²⁹. The decision of the Supreme Court (V. R. Krishna Iyer, Chinnappa Reddy and A. P. Sen, JJ.) was delivered by Krishna Iyer, J., who again reiterated that Sections 125 and 127 are a secular code deliberately designed to protect destitute women who are victims of neglect during marriage and after divorce; it is rooted in the State's responsibility for the welfare of the weaker sections of women and children, and is not confined to members of one religion or region. In his strongly worded judgment, Krishna Iyer, J. admonished a division bench of the High Court of Kerala, against whose decision the case came in appeal to the Supreme Court, for not following his earlier ruling on the subject in *Bai Tahira*.³⁰

28. Text of Rizvi, Ameenu'l Hasan's paper read at the seminar conducted by the Department of Islamic and Comparative Law quoted in 1/2 *Islamic and Comparative Law Quarterly*, 1981, p. 144.

29. (1980) 4 SCC 125: wherein Fuzlunbi married Khader Vali in 1966 and during their conjugal life a son was born to them. The husband, an additional accountant in the State Bank of India, drawing a salary well above Rs. 1,000 discarded the wife and the child, and the tormented woman *talaqued* out of the conjugal home, sought shelter in her parents' abode. Driven by destitution, she prayed for maintenance allowance for herself and her son under Section 125, Cr.P.C. and the magistrate granted payment of a monthly sum of Rs. 250 to the wife and Rs. 150 to the child. The husband challenged the award in the High Court where the unjustified neglect was upheld but the quantum of maintenance reduced to Rs. 100 p.m. The husband resorted to the unilateral technique of *talaq* and tendered the magnificent sum of Rs. 500 by way of *mehar* and Rs. 750 towards maintenance for the period of *idaat* hoping thereby of extricating himself from the obligation to maintain the wife. The maintenance order in favour of wife under S. 125, Cr.P.C. which was cancelled under S. 127(3), Cr.P.C. by three courts tier upon tier in the vertical system constituted the kernel of the legal grievance before the Supreme Court.

30. *Supra*, note 12.

Commenting on the division bench's decision, Krishna Iyer, J. said :

If her plea has substance, social justice has been jettisoned by judicial process and a just and lawful claim due to a woman in distress has been denied heartlessly and lawlessly. We say heartlessly because no sensitive judge with empathy for the weaker sex could have callously cancelled an order for a monthly allowance already made in her favour as has been done here. We say lawlessly because no disciplined judge bound by the decision of this court which lays down that law for the nation under Article 141 of the Constitution could have defied the crystal clear ruling of this court in *Bai Tahira v. Ali Hussain Fissali Chothia*, (1979) 2 SCC 316 by the disingenuous process of distinguishing the decision. We are surprised by this process of getting round the rule in *Bai Tahira's* case by the artful art of concocting a distinction without a difference. The sessions court and the High Court who had before them the pronouncement of the Supreme Court, chopped legal logic to circumvent it. Reading their reasoning we are left to exclaim how the High Court argued itself out of *Bai Tahira's* case by discovering the strange difference.³¹

Despite *Bai Tahira's* ruling, the High Court of Kerala seeking to confine it "only to the facts of that case", refused relief under the Code against a husband who had paid to his divorced wife all her dues payable under the personal law of the parties. Reacting sharply to the division bench's decision, Krishna Iyer, J. observed :

This court has already interpreted Section 127(3)(b) in *Bai Tahira* and no judge in India except a larger bench of the Supreme Court without a departure from judicial discipline can whittle down, whisk away or be unbound by the ratio thereof. The language used is unmistakable, the logic at play is irresistible, the conclusion reached is inescapable, the application of the law as expounded there is an easy task. And yet, the division bench, if we may with respect say so, has by the fine art of skirting the real reasoning laid down 'unlaw' in the face of the law in *Bai Tahira* which is hardly service and surely a mischief, unintended by the court may be, but embarrassing to the subordinate judiciary. There is no warrant whatever for the High Court to reduce to a husk a decision of this court by its doctrinal gloss.³²

31. *Supra*, note 29, (1980) 4 SCC 125, 127.

32. *Ibid.*, p. 129.

The decision which had, in the learned judge's opinion, been arrived at to his "bafflement³³ by the fine art of skirting the real reasoning" in *Bai Tahira*, was according to him "surely a mischief, unintended by the court may be, but embarrassing to the subordinate judiciary"³⁴. In the course of his judgment, Krishna Iyer, J. observed :

Even by harmonising payment under personal and customary laws with the obligations under Sections 125 and 127 of the Cr. P. C., the conclusion is clear that the liquidated sum paid at the time of divorce must be a reasonable and not an illusory amount and will release the quondam husband from the continuing liability, only if the sum paid is realistically sufficient to maintain the ex-wife and salvage her from destitution which is the anathema of the law. This perspective of social justice alone does justice to the complex of provisions from Sections 125 to 127 of the Criminal Procedure Code.³⁵

Reiterating the stand that it had taken in *Bai Tahira* the Supreme Court now chose "to declare the law foolproof fashion" and categorically held :

- (1) Section 127(3)(b) has a setting, scheme and a purpose and no *talaq* of the purpose different from the sense is permissible in statutory construction.
- (2) The payment of an amount, customary or other, contemplated by the measure must inset the intent of preventing destitution and providing a sum which is more or less the present worth of the monthly maintenance allowances the divorcee may need until death or remarriage overtakes her. The policy of the law abhors neglected wives and destitute divorcees and Section 127(3)(b) takes care to avoid double payment, one under custom at the time of divorce and another under Section 125.
- (3) Neither personal law nor other salvatory plea will hold against the policy of public law pervading Section 127(3)(b) as much as it does Section 125. So a

33. *Ibid.*

34. *Ibid.*

35. *Ibid.*, p. 135

farthing is no substitute for a fortune nor naive consent equivalent to intelligent acceptance.³⁶

The interpretation of Section 127(3)(b) of the Code made in the case of *Bai Tahira* and confirmed in *Fuzlunbi*, was admittedly based by the Supreme Court with a "compassionate expansion of sense of the statutory provisions".³⁷ The question of maintenance for divorced Muslim wives under the new Indian Code of Criminal Procedure would appear to be firmly concluded by the highest judicial authority. Such a woman, if unable to maintain herself, is entitled to maintenance until she remarries, unless her ex-husband, by way of *mahr* or other payment, has made adequate provision for her maintenance. The Supreme Court has done more to achieve this humanitarian result than the Indian legislature. Krishna Iyer, J. in delivering the decision in *Fuzlunbi*, defended judicial law-making by observing:

Many of the judges of England have said that they do not make law. They only interpret it. This is an illusion which they have fostered. But it is a notion which is now being discarded everywhere. Every new decision on every new situation is a development on the law. Law does not stand still. It moves continually. Once this is recognized then the task of the judge is put on a higher plane. He must consciously seek to mould the law so as to serve the needs of the time. He must not be a mere mechanic, a mere working mason, laying brick on brick, without thought to the overall design. He must be an architect—thinking of the structure as a whole—building for the society a system of law, which is strong, durable and just. It is on his work that civilised society itself depends.³⁸

Reforms by judicial law-making may, in sensitive areas, achieve objectives difficult if not impossible of realisation by political processes and without the public outcry that political debate engenders. The Indian judiciary, especially the Supreme Court, can in future tackle other problems of modernisation and reform which politicians have long shied away from and Parliament has been unable to deal with.

36. *Ibid.*

37. *Bai Tahira v. Ali Hussain*, *supra*, note 12.

38. *Supra*, note 29, (1980) 4 SCC 125, p. 128.

The case of *Fuzlunbi* has also generated mixed reaction. While some Indians and foreign scholars have strongly supported it, some of them finding it as a landmark in judicial law-making³⁹—an overwhelming section of the Muslims have viewed the case with greater anxiety than shown earlier for the parent ruling in *Bai Tahira*.⁴⁰ However, one remark about *Fuzlunbi* seems unavoidable. The sharp language and harsh expressions used in the judgment for the Kerala High Court, as also its general tone of condemnation for the decision appealed against, were surely unwarranted. *Bai Tahira's* was no ordinary decision. In view of its extraordinary and controversial nature, the learned High Court's hesitation to regard it as a trail and all embrative exposition of the law should have been duly appreciated. While commenting upon *Fuzlunbi*, Dr. Tahir Mahmood has opined that unless the Islamic law on divorced girl's maintenance is enforced in India by legislation, it will be unislamic to relieve the former husbands, in all cases, of the financial liability towards their divorced wives. Of course, the true Islamic law on divorcee's maintenance and the true Islamic concept of marriage were not appreciated either in *Bai Tahira* or in *Fuzlunbi*. The Supreme Court in some future case must consider at length, fully and properly, all aspects of the Islamic law relating to divorced girl's maintenance, including legal liability of parents to maintain their divorced daughters, legal liability of a deceased Muslim's heirs to provide maintenance to his or her dependants, moral duty of the divorcing husband to give maintenance to the divorced wife in suitable cases. *Wife includes a woman obtaining decree for the dissolution of marriage.*

The Supreme Court got an occasion in 1981 to pronounce on the rights of a Muslim woman, who had availed of the judicial procedure established under the Dissolution of Muslim Marriages Act, 1939 to receive maintenance from her husband under Section 125 of the Code of Criminal Procedure, 1973 in *Zohra Khatoon v. Mohd. Ibrahim*⁴¹. In this case the point at issue was

39. See Lucy Garoll: "Muslim Family Law in South Asia: Important decisions regarding maintenance for Wives, Ex-wives," *1/2 Islamic and Comparative Law Quarterly*, 1981, pp. 92-93.

40. M. Fazlul Haq: "Maintenance of Divorced Wives in Islam", *Radiance Views Weekly*, Delhi, 12th July, 1981.

41. (1981) 2 SCC 509: wherein Zohra Khatoon was a legally married wife of Mohd Ibrahim. Soon after the marriage the husband wilfully neglected

whether a Muslim wife who filed a petition for divorce against the husband under the Dissolution of Muslim Marriages Act, 1939 would be entitled to seek maintenance from him under the provisions of the Criminal Procedure Code. Arguing that the Code provision defining the term "wife" as one inclusive of ex-wives could not be confined to cases of extrajudicial divorces, the court decided the issue in the affirmative. The Supreme Court has unanimously, by two concurring judgment of Fazal Ali, J. and Koshal, J., upheld the right of a Muslim woman, who has obtained a decree of divorce against her husband by the forensic procedure provided under the Dissolution of Muslim Marriages Act, 1939, to claim maintenance, after such divorce, by virtue of Section 125 of the Code of Criminal Procedure. Fazal Ali, J. speaking for himself and on behalf of Varadarajan, J., observed :

Clause (b) of Explanation to Section 125(1) envisages all the three modes in which a dissolution of marriage can be brought about. Where a wife is divorced unilaterally by the husband or where she obtains divorce by or under modes numbers (2) and (3) (by an agreement between the husband and wife whereby she relinquishes either her entire or part of the dower—by obtaining a decree from a civil court), she

his wife and she filed an application before the trial magistrate on September 17, 1974 under S. 125, Cr.P.C. in order to fix maintenance for her and her minor son. The Special Judicial Magistrate after hearing the parties fixed the maintenance at Rs. 100 p.m. for the wife and the child. Allegation of the wife that she had been neglected by the husband without reasonable or probable cause was accepted. The respondent husband had taken the defence before the magistrate that as the wife had brought a suit for dissolution of marriage on the ground of cruelty and wilful neglect which was decreed by the civil court on 15.1.1973 and she was living separately, she ceased to be the wife of the husband and was thereof not entitled to maintenance under S. 125 or 127 of the 1973 Code. Ultimately, the husband moved the High Court under S. 482 of the 1973 Code for quashing the order of the magistrate as it was vitiated by an error of law. In the High Court the appellant argued that in view of clause (b) of the Explanation to S. 125(1) of the 1973 Code, she continued to be the wife despite obtaining a decree for dissolution of marriage and thus her right to maintenance would not be affected by the decree passed by the civil court. The High Court after hearing the parties was of the view that clause (b) of the Explanation referred to above would apply only if the divorce proceeded from the husband or was obtained by the wife from her husband. Marriage was dissolved here by operation of law only, hence clause (b) of the Explanation of S. 125(1) had no application and the appellant was not entitled to any maintenance under S. 125 of the 1973 Code, so far as she was concerned. The appeal was by special leave against the decision of the Allahabad High Court.

continues to be a wife for the purpose of getting maintenance under Section 125 of the 1973 Code. In these circumstances the High Court was not at all justified in taking the two separate clauses, "who has been divorced" and "has obtained a divorce from her husband" conjunctively so as to indicate a divorce proceeding from the husband and the husband alone and in not treating a dissolution of marriage under the 1939 Act as a legal divorce. We might like to mention here that the 1973 Code has by extending the definition of wife, not excluded the various modes of divorce but has merely abrogated that part of the Mohamedan Law under which the wife ceased to get maintenance if the conjugal relationship of husband and wife came to an end. Nevertheless, the personal law is applied fully and kept alive by clause (b) of sub-section (3) of the Section 127.⁴²

In his separate concurring judgment Koshal, J. tried to resolve the conflict created by the High Courts regarding the distinction between divorce and dissolution of marriage. He observed :

Divorce is nothing more nor less than another name for dissolution of marriage, whether the same results from act of parties or is a consequence of proceedings of law, and it would, in our opinion, be wrong to regard the two terms as not being synonymous with each other unless the legislature makes a direction to the contrary.⁴³

The decision of the Supreme Court is straightforward, logical and flows from the wording of Explanation to Section 125 of the Code, which reads, "(b) wife includes a woman who has been divorced by or has obtained a divorce from her husband and has not remarried". The court has rightly held that the expression "has obtained a divorce from her husband" includes the case of a woman who has obtained a decree of dissolution of her marriage (*Faskh*) from a court of law under the Dissolution of Muslim Marriages Act, 1939 and also includes other cases enumerated in the judgment.⁴⁴ Fazal Ali and Varadarajan, JJ. have also found

42. *Ibid*, p. 520.

43. *Ibid.*, p. 523.

44. Under the Mohammedan Law there are three distinct modes in which a Muslim Marriage can be dissolved and the relationship of the husband and the wife terminated so as to result in an irrevocable divorce :

(1) Where the husband unilaterally gives a divorce according to any of the forms approved by the Mohamedan Law, viz. *Talaq ahsan*,

a distinction in the wording of Section 127(3)(c) which according to them favours the position of a woman who has "obtained a divorce from her husband, i.e. one who has resorted to the Dissolution of Muslim Marriages Act as against one who has been divorced by her husband by the usual procedure of *Talak*. This distinction might become important in case the view of Fazal Ali and Varadarajan, JJ. prevails:

Under the Mahomedan Law the husband could still get the maintenance cancelled after divorcing his wife according to personal law if he paid the entire dower specified at the time of marriage.⁴⁵

which consists of a single pronouncement of divorce during *tuhr* (period between menstruations) followed by abstinence from sexual intercourse for the period of *idaat*, or *Talak hasan* which consists of three pronouncements made during the successive *Tuhrs*, no intercourse taking place between three *Tuhrs*; and lastly *Talak-ul-bidaat* or *Talak-i-bada'i* which consists of three pronouncements made during a single *tuhr* either in one sentence or in three sentences signifying a clear intention to divorce the wife, for instance, the husband saying 'I divorce thee irrevocably' or 'I divorce thee, I divorce thee, I divorce thee'. The third form referred to above is however not recognised by the Shiah Law. A divorce of *talaaq* may be given orally or in writing and it becomes irrevocable if the period of *idaat* is observed though it is not necessary that the woman divorced should come to know of the fact that she has been divorced by her husband.

- (2) By agreement between the husband and the wife whereby a wife obtains divorce by relinquishing either her entire or part of the dower. This mode of divorce is called '*khula*' or *Mubarat*. This form of divorce is initiated by the wife and comes into existence if the husband gives consent to the agreement and releases her from the marriage tie. Where, however, both parties agree and desire a separation resulting in a divorce, it is called *Mubarat*. The gist of these modes is that they come into existence with the consent of both the parties, particularly by the husband, because without his consent this mode of divorce would be incapable of being enforced. A divorce may also come into existence by virtue of an agreement either before or after the marriage by which it is provided that the wife should be at liberty to divorce herself in specified contingencies which are of a reasonable nature and which again are agreed to by the husband. In such a case the wife can repudiate herself in the exercise of the power and the divorce would be deemed to have been pronounced by the husband. This mode of divorce is called *Tawfeez*.
- (3) By obtaining a decree from a civil court for dissolution of marriage under S. 2 of the Act of 1939 which also amounts to divorce (under the law) obtained by the wife. For the purpose of maintenance this mode is governed by clause (c) of sub-section (3) of S. 127 of the 1973 Code.

45. *Ibid.*, p. 521.

The expression used by the learned judges is somewhat loose because neither the provision for maintenance nor the cancellation thereof arises under the Mahomedan law. Both these provisions are incorporated in Cr.P.C. No doubt there is a reference in Section 127(3)(b) to "the sum which under any customary or personal law applicable to the parties is payable on such divorce". It appears to be the view of learned judges that such sum payable under the personal law of the Muslims, is limited to the "entire dower specified at the time of divorce". However, the same view does not seem to have been specifically endorsed by Koshal, J. in the present case. The contrary view was adopted by the unanimous judgment of the Supreme Court, led by Krishna Iyer, J. in *Bai Tahira's case*. Krishna Iyer, J. held that in order to satisfy the requirement of having paid the "whole of the sum which under personal law applicable to the parties was payable on such divorce", must include not only "the entire dower specified at the time of marriage" but also any enhancement thereof afterwards by the husband and, in case such amount falls short of the sum requisite to provide reasonable maintenance to the wife, such amount as is necessary to make good the same. The view finds support in the express words of the *Quran*.⁴⁶ The provision that the "woman has obtained a divorce from her husband and that she voluntarily surrendered her rights to maintenance after her divorce" would appear to have reference to divorce by mutual consent. The usual concomitant of a *Khul* divorce is that the wife surrenders her right to the dower; by virtue of this clause it may now become common in India for a *Khul* agreement to also contain a stipulation whereby the wife surrenders her right to maintenance under Section 125 of the Cr.P.C. Whether in view of the Supreme Court's interpretation of Section 127(3)(b) such clause in a *Khul* agreement would be held to completely extinguish the ex-wife's right to maintenance under Section 125 of the Code will be an open question.⁴⁷

Conclusion

The breakthrough made by the Supreme Court in *Bai Tahira*,

46. *Quran*, Chapter II, Verse 241 (*Surat ul aqara*).

47. Lucy Carroll: "Muslim Family Law in South Asia", 1/2 *Islamic and Comparative Law Quarterly* 107 (1980).

Fuzlunbi and *Zohra Khatoon* has left certain questions unanswered. Are the concepts of payment of maintenance during *idaat*⁴⁸ and payment of dower identical with the concept of 'whole of the sum payable on divorce under any personal or customary law', referred to in Section 127(3)(b) of the Cr.P.C.? In order to attract that provision the customary or personal law must carry a stipulation regarding payment of some consideration to effect divorce. The concept of dower is actually that of a nuptial gift, i.e., payment at or about the time of solemnisation of marriage. It may be paid in full at that time or a portion may be deferred for payment on termination of marriage by death or divorce. To treat such a payment of balance of dower as equivalent to any assumed consideration for divorce will throw open the Pandora's box. If the whole of the dower is paid at the solemnisation of marriage what will be payable on divorce? Will this amount to advance payment of "the whole" of the amount, payable on divorce? If a portion is paid as prompt dower will the portion deferred answer the description of the "whole of the sum" under the provision? Will a stipulation to pay a nominal dower satisfy the underlying idea of payment of maintenance? What about those cases where no provision at all is made for payment of dower at the solemnisation of marriage? The *Kazis* solemnising the marriage cannot furnish us the proof of a stipulation to pay dower, apart from routine description of some *dirhams*⁴⁹ as dower. Fabrication of records will have to be resorted to as a rule in such cases if payment of dower is treated as equivalent to whole of the sum as contemplated by Section 127 of the Cr.P.C. Section 127(3)(b) operates on a different norm from the provisions for dower and maintenance under Muslim law. It will be highly heart-breaking to Muslim divorcees to deny them the benefit of Section 125 on such dubious grounds.

India has proclaimed itself to be a secular State, committed

-
48. *Idaat* is the term by the completion of which a new marriage is rendered lawful under Muslim Law.
49. A *dirham* (Persian, *diram*, a word derived from the Greek) is the name of a silver coin, 2.97 grammes in weight and is usually valued at 3-4 annas or 20-25 paise. See Wilson, Roland Knyvet: *Anglo Muhammedan Law - A Digest* (IV Edn.; 1912, London), p. 123. The work contains a learned discussion on the value of a *dirham* on the footing of the purchasing power of the silver contained in the coin.

to the ideal of a Uniform Civil Code. The Uniform Civil Code may be a distant objective but such meaningful, though inadequate, provisions like Section 125 of the Criminal Procedure Code being applicable to Indians regardless of their religious affiliations are bound to generate positive attitude towards reception of a future Uniform Civil Code. The Supreme Court has recognized the supremacy of the maintenance provisions of the new Code applicable to Muslims on the basis of general principles of a secular welfare State and other principles enshrined in the Indian Constitution. It cannot be denied that Muslim law in India has been moulded and developed by *Sharia* alone; it has adopted in several respects to the needs of the times through centuries of judicial interpretation, extending almost to two centuries; it could thus be suggested that the present trend in the case law is carrying forward the historical tradition inasmuch as Anglo-Mohammedan law has developed largely through case law, and has been modernised by the same process.

It would seem that our policymakers in the legislatures have been too sensitive to the demands of the spokesmen of the orthodox elements as is reflected in the amendment to Section 127 of the Cr. P.C. The amendment of the section by any standards is retrogressive as it is inconsistent with the basic purposes and values of a social welfare State which very rightly exhibits great concern in according rights of maintenance to women belonging to any or all sections and religious denominations of the country. It is in this context that the scope of Section 125 was considered at length by the Supreme Court in *Nanak Chand v. Shri Chandra Kishore*⁵⁰ in which an emphatic and prudent observation was made as under:

We are unable to see any inconsistency between the Maintenance Act and Section 488 of the Cr. P. C. the scope of the two laws is different. Section 488 provides a summary remedy and is applicable to all persons belonging to all religions and has no relationship with the personal law of the parties.

The current Indian ethos rightly regards strength of the social

50. See (1969) 3 SCC 802.

fabric. In the light of the fact that sociological factors have a role to play in understanding provisions like Section 125, Cr.P.C., the dramatic and innovative exercises on the part of judges in redefining and reinterpreting the uncodified Muslim Law was the need of the time.

TRIAL PROCEDURE FOR RAPE : A CRITICAL APPRAISAL

SHYAM SINGH

The impact of criminal justice system on the victims of rape and other sexual offences has received considerable attention in the legal as well as social circles. A greater attention needs to be paid to the female victim of a sexual offence in the context of change in the social system and increasing incidence of such offences. An increase in the incidence and volume of the sexual offences indicates the inadequacies in the law relating to such offences.¹ The Government of India, impelled by the constant demands of various women forums and scholars, referred the matter to the Law Commission of India in March 1980 for its consideration and report. The Law Commission after deeply studying and carefully considering the relevant law relating to rape and assault on the modesty of women, in a short period of one month, made its recommendations to the Central Government in April 1980.² The Commission recommended certain amendments in the substantive law dealing with the sexual offences against females as also in the law of procedure and evidence governing such offences. In pursuance to the recommendations of the Law Commission the provisions of the Indian Penal Code dealing with sexual offences against females have been amended by the Criminal Laws (Amendment) Act, 1983. The Act, though lacking in certain respects, is a step in updating of the laws enacted more than a century ago.³

A woman who is raped encounters traumatic experience on at least two occasions, when she is raped and during the subsequent trial, if it at all ensues. While the first seriously impairs her dignity, curbs her individuality and destroys her sense of security, the second is no less portent of mischief as it

* LL.M., Reader, Faculty of Law, University of Jammu, Jammu.

1. Table 'A' depicts the increase in the incidence of rape in the recent years.

2. 84th Report of the Law Commission of India.

3. Act 43 of 1983.

forces her to re-live through the traumatic experience during investigation and trial.

This paper aims to discuss in brief certain provisions of the law of procedure and evidence, so far they relate to the offence of rape, taking into consideration socio-economic background of the victim, Law Commission's report and the present state of Criminal Law, with a view to suggest possible reforms in the law.

Evidence as to Past Sexual History

How far should the past experience of the victim of rape be allowed to be given in evidence in a court on behalf of the accused is a very vital question of evidence in prosecutions for rape. This has been the source of very grave dissatisfaction with the criminal justice system. The offence of rape is sexual intercourse with a female without her free consent or with her consent in case she is below the statutory age of consent.⁴ Thus where want of consent of the prosecutrix is in issue evidence as to her past sexual history may take two forms. Firstly, the evidence as to her past sexual experience with the accused, and secondly, the evidence as to such experience with any other person. Evidence with regard to her past sexual history with the accused may become relevant under the provisions of Section 11 of the Indian Evidence Act.⁵ Under Sections 8, 9 and 14 of the Evidence Act evidence of past acts of sexual relation with the accused may also become admissible as showing conduct influenced by a fact in issue or a relevant fact (under Sections 8 and 9) and showing passion (under Section 14).⁶ It may, however, be noted that these sections would be material on the issue of consent and the permitted evidence must also relate to specific sexual acts with the accused only. But the most damaging and the stringent provision in this regard is embodied in Section 155(4) of the Evidence Act under which evidence as to general immoral character of the prosecutrix

4. S. 375 of the Indian Penal Code, 1860.

5. S. 11 of the Indian Evidence Act, 1872.

6. Ss. 8, 9 and 14 of the Indian Evidence Act, 1872.

in a prosecution for rape or an attempt to ravish may be given.⁷ The basis for incorporation of such provision in the Evidence Act may be found in the illusory fact that a woman who is of general immoral character might have consented to the sexual act by the accused in a particular case. How humiliating it is for a rape victim who is sought to be unashamedly questioned about her sexual life just not with the accused but with possible others for concluding whether she had consented to the particular sexual intercourse with the accused.^{7a} Every act of sexual intercourse by a male with the same female without her free consent amounts to a distinct offence of rape every time. There seems to be no justification to infer consent in a particular sexual act from the similar previous act with the same person to which the female might have consented.⁸ The provision may also be invoked even in the cases where a female is below the statutory age of consent and her consent is irrelevant.

Though the provision in question permits evidence as to general immoral character of the complainant, yet the victim of the offence whose dignity has been wounded is made to bear the brunt of harassment and humiliation in the trial court. This adds insult to the injury because of which most of the rape cases go unreported.

If that is so there is sufficient justification for abrogation of Section 155(4) of the Evidence Act and for similar reasons Section 146 of the Evidence Act may be suitably amended. However, if abrogation of the provision is not considered desirable on juridical basis, it may be amended so as to exclude the evidence as to past sexual experience of the prosecutrix with persons other than the accused and to exclude evidence as to such experience even with the accused where she is below the statutory age of consent.⁹

7. S. 155(4) of the Indian Evidence Act, 1872.

7a. See Dr. K.S. Chhabra, Law Journal of Guru Nanak Dev University p. 17.

8. *Ibid.*

9. The Law Commission recommended the modification of S. 155(4) of the Indian Evidence Act so as to exclude evidence of sexual relation with persons other than the accused. *Supra*, note 2, p. 38.

Corroboration of the Prosecutrix Testimony

There is no provision in the Indian Evidence Act to require corroboration of testimony of the prosecutrix in the prosecution for rape or an attempt to ravish. However, Section 114, illustration (b) of the Evidence Act prescribes a rule of presumption relating to an evidence of accomplice that "an accomplice is unworthy of credit unless corroborated in material particulars".¹⁰ But another provision of the Evidence Act which should not be lost sight of is Section 133 which provides that "a conviction is not illegal even if it is based on the uncorroborated testimony of an accomplice".¹¹ Now two propositions emerge: firstly, whether and in what circumstances conviction on the uncorroborated evidence of an accomplice is valid in law; and secondly, whether this rule of corroboration can be applied with respect to the evidence of prosecutrix in a prosecution of rape or an attempt to ravish. The reply to the first proposition will only be necessary, for the purpose of this paper, if the answer to the second proposition is in the affirmative.

The word 'accomplice' has nowhere been defined in the Evidence Act and the dictionary meaning of the word is "a guilty associate in a crime, a partner in crime".¹² An accomplice as defined by the Lahore High Court means a person who knowingly or voluntarily cooperates with or aids and assists another in the commission of a crime.¹³ His participation in the crime must be criminally corrupt. The House of Lords¹⁴ has classified accomplices as under:

- (i) participants in the crime charged (*particeps criminis*) whether as principals or accessories before or after the fact (in the case of felonies) or as persons committing, procuring or aiding and abetting a misdemeanour;
- (ii) receivers giving evidence at the trial of those alleged to have stolen the goods received by them; and

10. S. 114(b) of the Indian Evidence Act, 1872.

11. S. 133 of the Indian Evidence Act, 1872.

12. *The New Oxford Dictionary*, 13th Ed., p. 20.

13. *Ismail Hussan Ali v. Emperor*, AIR 1947 Lah 220.

14. *Davies v. Director of Public Prosecutions*, 1954 AC 378.

- (iii) parties to crimes alleged to have been committed by the accused.

Thus in a case of prosecution for rape a woman who has been raped is not an accomplice but she is victim of the offence¹⁵ and, therefore, the provisions of the Evidence Act with regard to the corroboration of the testimony of an accomplice do not apply to the testimony of the raped woman. The observation of the Supreme Court in the *Rameshwar*¹⁶ case that the testimony of a victim of rape when she is below the age of consent and has consented to the sexual intercourse with the accused "will naturally be as suspect as that of an accomplice" is not free from doubts. The rule of corroboration of the evidence of the prosecutrix which has not been enacted by the legislature has been incorporated, though as a matter of prudence, by the judicial decisions. "A large volume of case law has grown up which treats the evidence of the complainant somewhat along the same lines as accomplice evidence though often for widely differing reasons the position now reached is that the rule about corroboration has hardened into one of law".¹⁷ The Supreme Court has, however, explained the rule and observed that the rule is not that corroboration is essential before there can be a conviction but that the necessity of corroboration, as a matter of prudence, except where the circumstances make it safe to dispense with it, must be present in the mind of the judge before a conviction without corroboration can be sustained. Therefore, the rule of law emerges to be that this rule of prudence must be present to the mind of the judge and be understood and appreciated by him. In the present case the previous statement of the victim, a minor girl, to her mother was accepted as corroborating the evidence of the victim and connecting the accused with the crime.

The Privy Council in *Mohammed Sugal Esa v. King*¹⁸ has also observed, though in different context, that "in England where provision has been made for reception of evidence from a child it

15. *Rameshwar Kalyan Singh v. State of Rajasthan*, AIR 1952 SC 54; *Bhoginbhai Hirjibhai v. State of Gujarat*, (1983) 3 SCC 217.

16. *Ibid.*, p. 57.

17. *Rameshwar Kalyan Singh v. State of Rajasthan*, AIR 1952 SC 54, 56.

18. AIR 1946 PC 5-6.

has always been provided that the evidence must be corroborated in some material particulars in implicating the accused. But in the Indian Evidence Act there is no such provision, and the evidence is made admissible whether corroborated or not. Once there is admissible evidence a court can act upon it; corroboration, unless required by statute goes only to the weight and value of the evidence". But the court has sounded a note of caution that "it is a sound rule in practice not to act on uncorroborated evidence of a child, whether sworn or unsworn but this is a rule of prudence and not of law".¹⁹ In *Janardan Tiwari v. State of Bihar*²⁰ the Supreme Court has observed that "we are satisfied that this girl was raped and we have only to find out who the culprits were. In this connection, the law is that the evidence of the prosecutrix must be corroborated in some measure to connect the accused".

The decision in *Rameshwar's* case was approved in *Sidheswar Ganguly v. State of West Bengal*²¹ and the Supreme Court added that the nature of the corroborative evidence should be such as to lend assurance that the evidence of the prosecutrix can be safely acted upon. In the *Sidheswar* case the Supreme Court has observed that insistence on corroboration is admissible but is not compulsory in the eye of law. In *Gurcharan Singh v. State of Haryana*²² the evidence of the prosecutrix was found corroborated from her complaint to Harnam Singh and others and the other attendant circumstances. In *Madho Ram v. State of U.P.*²³, a case decided long after *Rameshwar* case, it was argued in vain by the learned counsel for the accused that in the absence of any corroboration for the evidence of the prosecutrix the conviction of the appellant based solely on the testimony of the prosecutrix is not legal. The court held that²⁴ "the prosecutrix cannot be considered to be an accomplice. As a rule of prudence, however, it has been emphasised that the courts should normally look for corroboration of her testimony in order to satisfy itself that the prosecutrix is telling

19. AIR 1946 PC 5-6, p. 6.

20. (1971) 3 SCC 927.

21. 1958 SCR 749, 759.

22. (1972) 2 SCC 749.

23. (1973) 1 SCC 533.

24. *Ibid.*, p. 472.

the truth and that a person, accused of abduction or rape, has not been falsely implicated. The view that, as a matter of law, no conviction without corroboration was possible has not been accepted.... As to what type of corroboration may be required when the court is of the opinion that it is not safe to dispense with that requirement, it has also been laid down that the type of corroboration required must necessarily vary with the circumstances of each case and also according to the particular circumstances of the offence with which a person is charged”.

In this case the sessions judge justified himself to proceed on the basis of uncorroborated testimony of the prosecutrix departing from the rule of prudence as to corroboration whereas the High Court found corroboration for the evidence from the testimony of the other witnesses and the attendant circumstances. It implies that the High Court was not inclined to confirm the conviction on the uncorroborated evidence of the complainant.

In a recent judgment of the Supreme Court in *Bhoginbhai Hirjibhai v. State of Gujarat*²⁵ the court expressed its opinion that “if the evidence of the victim does not suffer from any basic infirmity, and the probabilities-factor does not render it unworthy of credence, as a general rule, there is no reason to insist on corroboration except from the medical evidence, where, having regard to the circumstances of the case, medical evidence can be expected to be forthcoming, subject to the following qualifications: Corroboration may be insisted upon when a woman having attained majority is found in a compromising position and there is likelihood of her having levelled such an accusation on account of instinct of self-preservation or when the probabilities-factor is found to be out of tune”.

Although the judicial decisions tend to smoothen the path towards acceptance of the uncorroborated evidence of the prosecutrix in order to procure conviction, yet the tendency to require corroborative evidence as a matter of prudence cannot be ruled out. When the complainant is a competent witness and her credibility has not otherwise been impeached, why should her evidence be viewed with doubt, disbelief or suspicions? There-

25. (1983) 3 SCC 217, p. 226.

fore, to have a clarity and certainty in this area the legislative interference is required.

Non-recording of Information relating to Commission of Sexual Offences

The instances are not wanting where the police officers have refused or failed to record the information as to the commission of rape (a cognizable offence) and it may happen so, particularly, when the accused is a police officer. The remedy for such non-recording of information is prescribed in the Code of Criminal Procedure, 1973 under Section 154(3).²⁶ This provision of the Code, it may be noted, is not of a penal character. It is submitted that a punitive provision as recommended by the Law Commission may be inserted in the Indian Penal Code which will operate as a check on a police officer to record every information regarding commission of such an offence.²⁷

Medical Examination of the Victim and the Accused

The Law Commission of India took into account the nature of offence of rape and the circumstances in which it is committed and was satisfied that in good number of cases, particularly where there is no witness except the victim (and generally it is so), the accused persons are acquitted for want of proof or want of consent. Therefore, the Law Commission has recommended the insertion of a provision in the Indian Evidence Act with regard to the presumption that such intercourse was without the consent of the lady in the cases where the sexual intercourse has been proved and the question is whether it was without the consent of the woman and the woman has alleged that she did not consent.²⁸ The Criminal Laws (Amendment) Act, 1983 has partially incorporated this provision with regard to the custodial rape and the presumption is to be raised only when the sexual intercourse has been proved.²⁹ The sexual intercourse can be proved by the

26. S. 154(3) of Code of Criminal Procedure, 1973.

27. *Supra*, Note 2, pp. 19-20.

28. The Law Commission recommended the insertion of S. 111-A in the Indian Evidence Act. *Supra*, Note 2, p. 35.

29. The presumption as to consent in the case of custodial rape only is incorporated in Criminal Laws (Amendment) Act, 1983 by inserting S. 111-A in the Indian Evidence Act.

medical report only and there is no provision in the Code of Criminal Procedure, 1973 with regard to the medical examination of the victim. The cases are not wanting where the report of the medical examination of the female victim is found to be cursory which does not give adequate information about the material particulars which are necessary for constituting the offence of rape. Similarly even if there is a general provision in the Code of Criminal Procedure with regard to the medical examination of the accused³⁰ but it has been seen that the report of the medical examination is often superficial or is not given in time in the case of rape. Furthermore, without any statutory provision with regard to the medical examination of the victim and the medical reports in the cases of rape there is no uniformity in the reports of medical examiners and in the absence of a proper proforma for the report the chances of tampering with the medical reports cannot be ruled out.

Thus the presumption as to want of consent in the cases of rape in the absence of a provision as to the medical examination of the victim and the accused and report by the medical examiner is merely notional. Therefore, it is submitted that certain provisions in this regard may be inserted in Code of the Criminal Procedure, 1973 on the lines suggested by the Law Commission.

Appeals against Acquittal

Generally against every conviction for rape an appeal, and even a second appeal in some cases, is preferred but there are very few cases in which appeals have been preferred against the order of acquittal of the accused.³¹ The reason seems to be that conviction is against a male human being who dominates the society and he is on the pain of penalty, whereas in the case of acquittal of the accused there is nobody who has to suffer the punishment and the victim of the offence, a feeble and weak female, who has already suffered at the hands of accused and faced

30. S. 53, Cr.P.C.

31. A case study of Sessions Division, Patiala (Punjab), conducted by Sh. Baldev Singh Malhi, Department of Law, Punjabi University, Patiala, shows that during the span of about 5 years not a single appeal was preferred against 8 acquittals. (Journal of Guru Nanak Dev University, March 1982, p. 47).

the humiliation by the investigating agency and the torture of cross-examination at the hands of the defence counsel in the trial court, might not have any more energy to fight the accused in the appellate court and might have reconciled to her fate. And the State as a prosecutor might not have taken the initiative to prefer appeal. It is, therefore, submitted that there is a need for legislation incorporating a provision requiring the State to file appeals against the acquittal in rape cases which are fit for appeal and in all other cases the prosecuting authority should record a certificate to the effect that the case is not fit for appeal. Such cases which are not fit for appeal should be sent to the State Advocate-General for his opinion who shall give his opinion before the time prescribed for appeal expires.

Amendment of the Jammu and Kashmir Laws

All the central laws are not as such applicable to State of Jammu and Kashmir and for these matters the State has its own laws to which Indian Penal Code, Criminal Procedure Code, 1973 and the Evidence Act, 1872 are no exceptions. The State has its own Ranbir Penal Code, Code of Criminal Procedure and the Evidence Act, of course, more or less containing the same provisions as the Central Acts have. It is, therefore, submitted that while the central legislature is taking steps to amend the laws in the area under discussion, the State government should not be a passive spectator but should strive to amend its laws to cope with the emerging situations.

In the light of the foregoing discussions the following issues emerge :

1. Suitable amendments of Sections 155(4) and 146 of the Indian Evidence Act be made so as to exclude the evidence as to past sexual experience of the complainant with persons other than the accused in a prosecution for rape or an attempt to ravish. Further, the evidence as to such experience of the prosecutrix where she is below the statutory age of consent be altogether excluded.
2. A provision with regard to acceptance of the uncorroborated testimony of the complainant, in the prosecution

of rape or attempt to ravish, in the specified cases be inserted in the Indian Evidence Act.

3. A penal provision prescribing punishment for a police officer who refuses or fails to record the information with regard to the cognizable sexual offences be inserted in the Indian Penal Code.
4. A detailed provision with regard to the medical examination of the victim and the accused in a rape case be made in the Code of Criminal Procedure, 1973. Further, a provision with regard to the appeal against the acquittals in prosecutions for rape in fit cases be made.
5. The changes should also be incorporated by amending the relevant laws of the State of Jammu and Kashmir.

Table A

Rape cases		Cases reported	Volume per lakh population	Total No. of cases for trials during the year	No. of cases in which trials were completed	No. of cases added in conviction	Percentage of cases ended in conviction to total cases for which trials were completed
Year							
1972		2605	0.46	4379	1349	552	40.9
1974		2962	0.5	5431	1545	657	42.5
1975		3376	0.6	6158	1709	702	41.1
1976		3893	0.6	7142	1959	814	41.6
1977		4058	0.6	7874	2246	907	40.4
1978		4558	0.7	8947	2721	659	35.2

Note :—The data is taken from Crime in India.

MEASURES OF POPULATION CONTROL AND WOMEN'S RIGHTS

S. G. SINGH

The population issues all over the world have been conventionally regarded as of medical, biological, demographic and economic concern. The population policies adopted by a large number of countries even today reflect a clear bias in favour of medico-clinical approaches. India is no exception in this respect. It was only later, when questions of public resistance and of motivation arose, that the sociological, psychological, political and religious aspects were taken into account. The legal aspect, however, has only recently attracted the attention of the social scientists and the policy makers.

There is an increased realization currently that law and population are intimately inter-connected and that the law can be used as one of the most potential instruments of State policy to influence the population trends of a country. State action through legislation can be made to act on two different, though inter-related levels.

1. Passing laws and bringing necessary changes in the existing laws which directly affect fertility by intervening at some point in the procreation process.
2. Passing laws and bringing appropriate changes in the existing laws and the socio-legal institutions which affect fertility indirectly through regulation of social relationships and the diverse factors underlying the individual attitudes and decisions bearing on family formation and related familial goals.

Laws relating to sterilization, abortion and contraception belong to the first category and the laws dealing with conditions of marriage, termination of marriages, mutual rights and obligations

* LL.M. (London), LL.M., J.S.D (Yale), Professor of Law and Dean, University Education, G.N.D. University, Jalandhar.

of spouses and children regarding support and protection, child labour, social security including maternity benefits, taxation structure, incentives and disincentives all belong to the second category.

A number of recent studies have shown that raising of the age of marriage for females, providing them with better opportunities of higher education and gainful employment outside home and ensuring a higher status within and outside the family are directly correlated to a lower birth rate and a smaller family size. Appropriate laws can thus be adopted and policy adjustments made to manoeuvre these factors leading to the achievement of desired population and social welfare objectives. In other words, depending upon whether a country desires an increase or decrease in its population, socio-economic conditions can be subjected to policy manipulation to promote pro-fertility or anti-fertility factors and attitudes among the people. This paper, however, is confined to the utility of contraceptives, sterilization and abortion as modes restricting the fertility. Its scope is further restricted to the consideration of these measures in the context of women's rights.

Population control and family planning is an area which concerns the most intimate feelings and functions of an individual's life. Whenever the State action is accepted in such an area, crucial questions of individual and human rights, of protection and safeguard of moral and social values, crop up especially in the democratic countries. The following part of this study mainly focuses this aspect of the problem.

Women constitute half the population of India and their role in the national development, maintenance of families as a social unit and family planning is well recognised. The governments are therefore increasingly directing their population control measures towards them. Otherwise too, the population control measures and devices are liable to affect females directly and more seriously than males. Abortion by its very nature concerns women. Diverse effects of the pregnancy termination—surgical, physical or psychological, are directly related to the female; impregnator is involved remotely and indirectly. Latest, improved techniques of sterilization—vasotubectomy, laprascopy, etc.—are aimed at

women despite the fact that a sterilization of a male is simpler than of a female. Culturally and traditionally also, it is the Indian wife rather than the husband who is obliged to carry out the couples' family planning decisions. Position is no different in case of contraceptive devices. The techniques and appliances for male use are fewer, transitory and on-spot-use type while those for females are of a comparatively more permanent type, i.e. loop, plugs, pessaries, preventive drugs for oral use like pills, etc. The medical and health implications of the latter are naturally more serious as compared to the contrivances in use by males. This indicates the need for a higher degree of vigilance and protection of the rights of the females participating in these measures of population control especially in the Indian society, where the female position has been traditionally regarded as inferior to male and where even today constitutional guarantees and equal protection laws often fail at the implementation level. Such laws do not prove effective in the face of custom, convention and prevailing social value system.

One may start considering the various aspects of legal rights and safeguards available to the female in the area of population control or family planning by asking the question: Do the Indian women enjoy a full and free right to make decisions about fertility control of their choice or are they bound by the overriding will or volition of the husbands, the mothers-in-law or even other family members?

What are the legal implications if a woman undergoes an abortion or sterilization operation without the consent or against the express wishes of her husband? Will it have any bearing on matrimonial remedies of divorce and judicial separation? The quest for answer to these questions leads us to more basic and fundamental issues of human rights, constitutional guarantees and juristic norms requiring a review of the national laws and the socio-legal institutions to ensure that they are based on the principles of equality between the sexes and provide the needed protection and safeguards to the weaker sex to maintain the equality.

Of no less importance are the other issues which crop up at

the post-determination stage i.e. after a woman has decided to accept one of the measures of population control. Provision of appropriate clinical facilities, necessary hygienic and sanitary conditions and safety standards in respect of birth control devices and techniques is the primary social concern. This aspect assumes great importance in the Indian society which is by and large still conservative, illiterate and male dominated, especially its rural majority constituting about 80 per cent of the population. Health services and clinical facilities for rural women must be such which are within their easy reach. The location, staffing pattern and procedures followed in the health centres are crucial factors in free and full exercise of the right by rural women who are under constant surveillance and eye of the village elders, seldom moving freely within or out of the village particularly in matters relating to health care and medical consultations. As such, mere existence of provisions safeguarding one against undue publicity and ensuring right of privacy may not be sufficient in small village communities; they must be scrupulously translated into practice. Implementation aspect of the laws, in other words, is of greater importance. It is mainly from this angle that the study of the three measures of population control, abortion, sterilization and contraception, is undertaken in the remaining part of the paper.

Abortion

Indian women, like women all over the world, have been opting for abortion for centuries in the past. Prior to the passing of the Medical Termination of Pregnancy Act, 1971, abortion was dealt with by the penal law of the country. Indian Penal Code regarded it a crime both on the part of the abortionist as well as the mother, attracting penal sanctions of imprisonment and fine. This law, however, permitted only abortion performed in good faith to avert a serious, medically indicated threat to the pregnant woman's life. Thus, in a technical sense, the Indian law did permit abortion but on extremely narrow grounds. In keeping with the modern thought and social demands, the Indian Parliament passed the Medical Termination of Pregnancy Act, 1971. This statute brought about a fair relaxation in the grounds previously available. Besides conventional therapeutic and eugenic

grounds, the law permits abortion on a broad range of humanitarian and social indications. Various statutory provisions and the rules made thereunder require conformity with approved medical standards. Only qualified registered medical practitioners can terminate pregnancy at a hospital established by the government or at institutions duly approved or certified by it. Certain States allow only a registered practitioner with the prescribed experience or training in obstetrics and gynaecology. Termination facility in public hospitals is free of charge but other incidental expenses like diet and medicines where needed may have a restrictive influence. The law further makes it obligatory that unless circumstances make it impossible the pregnant woman's or her guardian's consent be obtained. Guardian's consent will be necessary only where the woman 'seeking' abortion is minor or is insane. No provision has been made for the husband's consent which as already pointed out may have implications in matters of marriage and divorce. In case of pregnancy of less than twelve weeks' duration, a registered medical practitioner, generally the head of the clinic concerned, decides whether the case is fit for operation. Where the pregnancy exceeds twelve weeks but not twenty weeks, termination is possible on the advice of two medical practitioners.

The rules provide safeguards for the woman opting for abortion against undue publicity. For instance, they require that the records be kept secret and the entries in the general hospital registers be made by code number and not by name. All such records are to be destroyed after five years. But the implementation of these laws and their actual working needs to be cautiously monitored. Proper maintenance of records and their secrecy has a direct bearing on the rights of the females opting for pregnancy termination. Of the various forms prescribed to collect the relevant information about the case of the pregnant woman, form to be completed and submitted by the surgeon to the higher authority under sub-rule (1) of Rule 18 is most elaborate and informative. The compliance of the rule on the part of medical authority needs to be checked. Since most of the information is to be provided by the pregnant woman, it would have been better to design the form so as to have two separate

parts of the form to be filled in by the surgeon and the woman respectively.

Liberal abortion law and recent advances in abortion techniques, especially the suction method which can be used without general anaesthesia, increase the possibilities of wider application of abortion in India. Recourse to abortions, however, will remain limited in practice by an acute shortage of qualified doctors and of adequate surgical facilities in rural India. Low-keyed publicity of the facilities and social reluctance to avail of them are some of the other restrictive factors in this regard. When talking about restrictive laws and practices one may also note that unlike the Indian statute (prescribing periods of 12 and 20 weeks) the U. K. Abortion Act, 1947 does not take into account the length of the pregnancy. In Indian conditions it is perhaps still necessary where the medical skills and facilities are inadequate and medical judgments without a statutory rider cannot be relied upon. Similarly, under the U. K. enactment risk of the injury to the physical or mental health of the pregnant woman need not be a grave one, but under the Indian Act risk must be a grave one. The requirement of a guardian's consent in case where the abortion seeker is a minor woman also needs a fresh look especially in view of court decisions in some advanced or permissive societies holding such restrictions as violative of individual and human rights. Another interesting situation in the Indian law may be noted in passing which is in all probability product of the moralistic stance of our legislature resulting in a discriminatory legal work. All the listed grounds in the Termination of Pregnancy Act are available to a married female. An unmarried woman can take advantage of the law if and when she fulfils the conditions specified in the Act, namely, if and when the pregnancy is the result of rape or it gravely endangers the life of the woman. But as far as the pregnancy resulting from failure of any contraceptive device is concerned, Section 3, Explanation II gives the right of determination and of pregnancy termination to a "married woman" only. The unmarried woman and widows are excluded from seeking abortion through legally established channels and facilities. The abortion seekers and medical profession may no doubt collude to bring such cases

under statutory umbrella by declaring that the pregnancy poses risk of grave injury to the physical or mental health of the pregnant woman. But the point is that where is the need for retaining such hypocritical laws on the statute book?

Recent scientific developments have made it possible through simple tests to determine the sex of the child in early stages of conception. Apprehension that it may lead to selective termination of pregnancy (foeticide) has raised moral and ethical questions of great importance. The consideration of this aspect, however, is beyond the scope of the present paper.

Sterilization

Surgical sterilization operations for therapeutic and eugenic purposes are common all over the world. India, along with some other countries, is making good use of sterilization as a means of population control as well. The legality of therapeutic or eugenic sterilizations is seldom in question unless performed without the "patient's" consent. The legal status of sterilization as a method of birth control, however, is ambiguous and undefined. In the absence of any statutory provision legal issues of importance arise both in respect of the sterilization seeker and the performing surgeon. We are here concerned only with the female sterilization seeker. Latest trends, techniques and traditional bias, all contribute to progressive sterilization of the female population in India. As such, the rights and safeguards available to the females in this regard are of great relevance.

Like in abortion, question of consent in sterilization is material. An operation performed without spousal consent may have consequences with respect to marriage laws and matrimonial causes. In the initial stages of sterilization programme, the government directives required the surgeon to obtain written consent of both husband and wife for sterilization of either. Later in April 1968, the government decided that for vasectomy it would be sufficient to get a statement from the person concerned to the effect that he has obtained the consent of his wife. The application for the vasectomy was, therefore, revised accordingly. In case of tubectomy, the institutions require that written consent

of both the husband and wife be obtained as originally stipulated. Consent is also required in case the person is to be operated under general anaesthesia.

The operating surgeon is further obliged to explain the nature of the operation to the patient and preferably, if possible, to both the marriage partners. He should also explain that for all practical purposes, the operation is a permanent measure. Even though reversing operation can be performed, its success in all cases cannot be guaranteed. Sterilization Manual issued by the Government of India in 1971 lays down clinical standards for operations and maintenance of certain minimum physical facilities. Depending upon the strength of the surgical team, the manual places a ceiling on the number of operations to be performed in a day. Besides, both the Central and State Governments have laid down rules and policy guidelines requiring the doctors to strictly assess the eligibility of the applicant in term of age, number of living children, marital status and similar other criteria. No person is to be sterilized unless he has attained 25 years of age, is married, has two or three living children and his consent has been obtained for the operation. Recanalization or reversion of an operation is provided only in a case where some or all the children of a sterilized person die due to illness or natural catastrophe or if such a person remarries and desires to have children. Facilities for recanalization operation are provided at the various medical colleges and bigger hospitals only. Diet charges, travelling and incidental expenses are allowed to the patient in deserving cases.

Despite all these guidelines and official directives there is, in actual practice, frequent violation of the legal, administrative requirements and safeguards. It is doubtful whether the Indian medical services follow these guidelines and have the capacity and the necessary infrastructure to do so. Maintaining the required hygiene and clinical standards; assessing the eligibility of the applicants in terms of age, marital status, number of living children; explaining the nature of the operation and obtaining consent and other particulars on the prescribed forms and proformas and maintaining records of all this and more is perhaps

too much to expect from an already overburdened and none too efficient a service. Illiterate or semi-literate status of the applicants makes the matter even more complex and difficult. One can hardly expect after-care or follow-up services in such conditions. Many cases came to light in the post-national—emergency period where sterilization has been performed on unwilling, unmarried and persons of unproductive age. The Union Government gives 100 per cent assistance to the States for the family planning programme including money incentives to the promoters, persons undergoing sterilization and sometimes to the surgeon. Of these most dubious is the part played by promoters. An overenthusiastic administration with the help of mercenary motivators often make desperate efforts to achieve fixed targets trampling mercilessly the legal norms and a few safeguards provided under the official rules. This indicates clearly the need for legislative measures for establishing a comprehensive legal framework including sterilization as a measure of population control. A statute on the lines of Singapore Sterilization Law (The Voluntary Sterilization Act, 1969) should be welcome.

Contraception

Indian law has no direct provisions dealing exclusively with the manufacture, sale, supply or use of the various contraceptive devices or for that matter with the dissemination of birth control information. Nevertheless, a considerable part of India's statutory law has bearing on these questions. The laws governing import-export trade, foreign exchange and customs regulations, requirements regarding licensing and registration of industry and business including pharmacists and medical practitioners—all have a bearing on the sale and supply of drugs and contraceptive devices. Then there are laws for quality and price control and still others prohibiting the publication of misleading advertisements, false labelling or claiming of magical efficacy for any drug. Most of these regulations aim primarily at preventing the manufacture, distribution and advertisement of drugs which are harmful or for which false claims are made, their application to contraceptive material being incidental. Besides this, there are laws

pertaining to obscene objects, obscene and objectionable publications and their transmission by mail. Most of these laws seldom come into play with regard to family planning since, in pursuance of its declared public policy, the Indian Government is itself manufacturing, distributing and publicizing birth control devices. In its distribution scheme, the government leaves the choice of method entirely to the individual. All the same, the State prefers to popularize sterilization which requires one-time motivation as compared to other methods. The birth control appliances or devices which need clinical administration and expert advice are available only through government clinics and hospitals. Conventional contraceptives including chemical preparations are distributed through licensed drug stores as well. Condoms, however, are sold even by general stores and grocery shops. In addition, they are distributed free through the urban family planning centres, rural sub-centres and through various other channels. Only qualified doctors are required to perform loop insertions. Initially, the government tried use of oral pills on experimental basis by introducing it in certain pilot projects only. The pills are now available at most chemist shops on prescription by qualified medical practitioners.

In view of the public policy and comparatively innocuous nature of these contraceptive devices, no direct legal issue of any consequence arises in the area. However, some legal and moral issues attract our attention when we consider the matter in terms of a woman's right of free access to the family planning information and procurement of the devices without staking one's liberty and privacy. Due to peculiar social set-up and their status in the community, as pointed out earlier, women stand at a disadvantage specially in villages and small towns. Greater efforts should be made to publicize the location and purpose of the family planning centres and to reduce the physical and psychological impediments to their greater use by women. To that extent, there is need to bring about necessary institutional changes and tilting the law in their favour. Compared to the male use devices, the devices for females are complicated and longer-time-retention type mostly needing clinical administration. Pill is liable to have side effects in some cases. Thus, besides providing for a system of

after-care and follow-up in these cases, appropriate safeguards are indicated in the use of the devices by females.

The State policy of offering incentives and disincentives for 'persuading' people to adopt family planning measures is another closely related aspect with the study in hand which attracts a lawyer's attention. Since 1968, the question of incentives and disincentives has seriously engaged the attention of the Indian Government. The Central Family Planning Council recommended that the grant of various concessions, benefits, loans, reliefs, maternity leave, subsidies (except in case of agriculturists and during droughts, epidemics and other natural calamities), scholarships (except on merit), free-ships, allotment of land and houses, etc., should after adequate notice cease in case of those families who do not restrict their size to three living children or the present size, if they have already more than three children. The Small Family Norm Committee also made recommendations on similar lines. These recommendations were circulated to the State Governments as well. While the Central Government² did not take many positive steps in regard to its employees, many State Governments went ahead enthusiastically.

The States of Uttar Pradesh and Maharashtra provided the most comprehensive and drastic schemes of disincentives both for the general public and their employees. Deterrents for the government employees included the withholding of increments, promotions and confirmations, premature retirement, withdrawal of free medical facilities and loan assistance, etc. The States of Kerala, Madhya Pradesh, Orissa and the then State of Mysore mainly confined themselves to the disincentives of limited maternity leave benefits for female government employees. During the emergency period (1975-76) most of these disincentives somehow or other got linked with the sterilization programme, and became an easy handle with the administration in its relentless effort to achieve sterilization targets. This caused a setback to the disincentive scheme. Immediately before the nation went to polls in 1977, many State Governments including Uttar Pradesh, Rajasthan, Himachal Pradesh and Tamil Nadu withdrew this scheme. Other States which did not formally withdraw them allowed them to

fall in disuse excepting probably the limitation on maternity leave. Only recently, some State Governments have cautiously reintroduced modest schemes of incentives and rewards.

There is nothing wrong in having a scheme of benefits and deterrents inducing people to take voluntary decisions regarding family limitation. In considering this issue one must remember that the main purpose of these measures is to counter diverse cultural and institutional motives for having large families and to bring private behaviours in conformity with general welfare. In fact, such measures become necessary when tradition and custom overshadow 'rational' economic and social motives for human action to a harmful degree. Incentives and disincentives in such circumstances may help people escape from inertia and re-examine their old ways of thinking. One should, for this reason, accept these inducements as long as they do not become coercive or otherwise overstep the individual and human rights and democratic norms.

But as and when the State introduces a package of inducements with an inbuilt mechanism of high rewards and severe deprivations, many moral and legal questions arise for consideration. The basic conflict arises between the democratic ideal that individuals should make free and voluntary decisions regarding family limitation and the fact that the larger social interest demands social intervention for achievement of national goals. The question is thus essentially one of deciding what is or is not justifiable social intervention to limit births. In India today, the birth control measure which raises these problems most acutely is sterilization.

In order to maintain the democratic character of India's family planning programme, the State must recognize that at some point in its long chain of incentives, ranging from free transportation or rest leaves to the reduction of prison terms, the idea of truly voluntary consent becomes unreal. The problem is aggravated because, due to its low level of literacy and comprehension, India's general population is easily manipulated and its consent can be readily obtained especially where the females are concerned. In a larger sense, the problem is not confined

to the cases where consent of a patient for sterilization, for instance, is obtained by force or fraud. The State can coerce through incentives which under the circumstances cannot be refused. Offer of a radio, an increment in salary or free education to a child in the developed countries may be a non-issue but in the prevailing social and economic conditions of want, misery and unemployment in this country, the charm and attraction of such offers may virtually amount to coercion and force. Cases are on record where several bachelors a few years back underwent sterilization by misrepresenting that they were married and had more than three children. What lured the bachelors into operation was presumably the incentive money offered by the government to married men who take to family planning. If the object of India's population policy, including sterilization, is to avoid compulsion, it must also avoid procedures that nullify voluntary choice. One way to do this is to provide legal safeguards especially to the females.

The author has in this paper primarily aimed at raising debatable questions without pretending to answer them. Easy answers in any case are not possible in an area like population control which has been neglected so long by social scientists. There is a crying need for research and empirical studies in order to identify the gaps and the distortions in the law as it stands and the law as it is implemented or administered. Only then some concrete suggestions can be made and effective steps taken to safeguard the rights of men and women involved in the process of population control. And the need for action in this direction is imperative and of overriding importance lest, like the medical and administrative measures taken so far, law also falls in the estimation of people as an instrument of social control in the field of population control.

EMANCIPATION OF WOMEN AND POPULATION CONTROL

BRINDERPAL SINGH SEHGAL

India's population has crossed 700 million mark which is second only to China. This rapid increase in the population has given rise to various problems viz. poverty, unemployment, ill-health, malnourishment of children, etc. We are unable to give even the minimum inputs to our children. It has become necessary for us to give first priority to this problem of rapid population growth. A sound population policy is the only weapon in our armoury in this battle against poverty, unemployment, malnourishment of children. The position and status of women in the society must be a key factor of a sound population policy. The women's emancipation is an essential and first step in achieving real progress in national development and there seems to be no alternative to economic and social progress. The impact of the emancipation of women on India's population problem has so far received little attention. The male dominance or the excessive masculinity of India's population is a notable characteristic highlighted by nearly every decennial census report. The sex ratios for the last nine census years (1901-1981) are 972, 964, 955, 950, 945, 946, 941, 930, 935 females per 1000 males.

Table 1

Growth of female population in India 1901-1981 (in millions)

Year	Total population	Male population	Female population	Females per 1000 males
1	2	3	4	5
1901	238	121	117	972
1911	252	128	124	964
1921	231	128	123	955

* B. Sc., LL.M., Reader in Law, University of Jammu, Jammu.

1	2	3	4	5
1931	279	143	136	950
1941	319	164	155	945
1951	361	186	175	946
1961	439	226	213	941
1971	548	284	264	930
1981	684	354	330	935

(Source : Ministry of Social Welfare, Government of India)

The latest research has revealed that the improved social-legal status of women with better living conditions and greater awareness has a direct impact on the acceptance of small family norm by women. Despite social legislation enacted during the last half a century, the attitudes in the country are such that even today, especially in rural areas and in certain orthodox communities, a girl is looked upon as a liability, whereas a boy is welcomed as an asset. Women are being displayed in the marriage market and evaluated according to the dowry, while her personal qualities (including household and education) are disregarded. These legislations have had no substantial impact on the traditional Indian attitude towards marriage and the procreation of children. There is an undesirable feature of the social ban on widow remarriage. Large families and heavy domestic commitments make it difficult for women to carry out their multiple roles. Preoccupation with responsibilities of larger family is a major factor impeding women from participating actively in the civil life of the country. Women are to prove their femininity by pregnancy as early as possible after the marriage. Women without children and those who unduly delay delivery of the first child become the objects of ridicule and pity. A woman's prestige in the eyes of her husband, her relatives and the community at large depends largely on the number of children (especially the sons), she bears. Our policy-framers did not pay much attention to such traditional

beliefs which are detrimental to carrying out of measures of both population control and emancipation of women. Although improvement has taken place in the social status of women after independence, little change has taken place in her domestic status. An important factor in this regard is the traditional role of women as house maker and keeper and rearer of children. The employment and education of women have generally been considered undesirable from the standpoint of the family and society especially in the rural sector. Women do not have the authority to control their own fertility through family planning measures for several reasons. The present status of women within and outside the family seems to be a major factor for their ignorance or lack of knowledge of family planning methods, their access to such legal means to regulate their pregnancies and even on their desire to do so. It is a superficial view that women should not compete with men who are breadwinners for the reason that the manpower is in excess. This approach can be refuted easily by the fact that population structure of India reflects a very high proportion of young persons under fifteen years giving rise to an unfavourable ratio between the productive and the dependent population. Women's contribution in production becomes a necessity. Many studies suggest that in practice the greater are the resources that a woman brings into her marriage relative to those of her husband (especially in regard to her higher vocational education and outside paid employment or essential agricultural production) the more equal her voice is likely to be in the major decisions of the family. It has been further noted that if there is equal division of labour (including decision making) a couple is more likely to have communication and adjustments regarding family size with women who indeed favour small families. The factors which enhance the status of women in a family and make her role more effective in population control are age of marriage of women, her position in joint family and her educational and employment conditions. Due to paucity of space and time it is not possible to discuss all these factors, but we take up only the effect of age of marriage of women on population problem of India.

Recent studies indicate that if the minimum age of marriage for females were fixed at 20 years, the reduction in the birth rate

in a decade would range from 12 to 30 per cent. We are having various legislations governing the age of marriage of women in India. Depending upon the religion, one can be governed by Hindu Marriage Act, Muslim Law, the Indian Christian Marriage Act and the Parsi Marriage and Divorce Act. There also exists the secular Special Marriage Act, which is applicable to spouses practising different religions. All these laws prescribe a minimum age at marriage both for men and women but there is no uniformity in this respect. The law also forbids a child marriage. Earlier, the object of prohibiting child marriage was to solve the problem of child widows, who remained secluded with a social stigma. But now the object is to control the rapid growth of population.

In India the main purpose of marriage is procreation of children. Love, companionship, sex and pleasure find a secondary though important place in married life. Social, religious and economic pressures generally lead to early marriage of girls in India. Moreover, ancient Indian literature also authorised marriage of girls before they attain puberty and the old Hindu Law allowed marriages between children of any age. Over the last few decades the legislature has acted twice to prohibit the child marriages but for one reason or the other, the law could not be enforced strictly, thus it failed to achieve its object. Consequently early marriage is still practised in India. Just recently a news appeared that 10,000 child marriages were performed on one single day in the State of Rajasthan in presence of elderly persons of the village. And this is a regular phenomenon in other parts of the country also. According to 1961 census, the average age of brides at marriage was only 16, and more than 8 per cent of girls aged 14 and below were married. According to the 1971 census, the average age at marriage of females has increased from 13.2 during 1901-1911 to 17.2 during 1961-1971. According to a sample survey, the mean age of marriage for females during 1961-1971 was 16.7 in rural areas and 19.2 in the urban areas. The higher age of marriage of females in urban areas is only due to better education and employment facilities provided to females which enhance her social status both inside and outside the household.

Table II*Mean Age at Marriage for Females in India 1901-1971*

<i>Decades</i>	<i>Mean Age at Marriage</i>
1901-1911	13.2
1911-1921	13.6
1921-1931	12.6
1931-1941	15.0
1941-1951	15.4
1951-1961	16.1
1961-1971	17.2

Table III

Mean Age at Marriage for Females (1961-1971)
(based on 1 per cent sample data)

<i>Area</i>	<i>Mean Age at Marriage</i>
Rural	16.7
Urban	19.2

(Source: Ministry of Social Welfare, Government of India, New Delhi)

Keeping into consideration the social pressures, the age at marriage both for males and females was regulated through the Child Marriage Restraint Act of 1929 amended in 1949 (popularly known as Sarda Act) which made it punishable for a male below 18 to marry a girl below 15 years of age or for persons to perform, conduct or direct the marriage of males under 18 and of females under 15 years of age. This Act has general application irrespective of the religion of the parties contravening its provisions. Besides, various States have enacted laws regulating the age of marriage of brides. The Sarda Act made no provision for the relaxation of the general age limits prescribed by it in any circumstances whatsoever. Nothing in it suggested that a marriage in violation of its provisions would be void, voidable or invalid. This question it left to be decided by the personal law of the parties. Keeping into consideration the acute population problem, the Sarda Act was amended in 1979 as a result of which the age at

marriage for males and females was increased to 21 and 18 respectively. All other provisions of the Act that penalise persons responsible for a child marriage are now to be read subject to this change. An important change has been made in the Sarda Act to check the marriage of infants, by making offences committed under it as cognizable. The Patna High Court had upheld the constitutional validity of the Sarda Act as early as in 1933.

After independence, Parliament enacted Hindu Marriage Act, 1955, which is applicable to 80 per cent of the population. This act initially prescribed 15 and 18 as the lowest age of marriage for females and males respectively. However, the Act required the consent of the guardian of girls in the age group of 15-18 for their marriages. The Act prescribed mild punishment of fifteen days' imprisonment or a fine of Rs. 1000 or both in case of violation of the aforesaid rules relating to marriage age and parental consent. The Act did not make a marriage violating the rule regarding minimum age either void or voidable. Later on, with the amendment of Sarda Act in 1979, the Hindu Marriage Act was also amended as a result of which the lowest age of marriage has been raised to 18 for girls and 21 for males, thus abolishing the requirement of parental consent for girls. No change has been introduced in the penal clause of the Act. The nature of an underage marriage under this Act has been the subject of controversy in the various High Courts. The Himachal Pradesh High Court as early as 1961 and Punjab and Haryana High Court in 1972 declared that an underage marriage in violation of the Hindu Marriage Act would be neither void nor voidable and would entail only the penalties prescribed by the Act. However, a division bench of the Andhra Pradesh High Court pronounced a remarkable judgment in 1975 declaring an underage Hindu marriage as *void ab initio*. Disagreeing with the decisions of the aforesaid High Courts, it held that if such view was accepted "it will throw open once again floodgate of child marriages". It concluded that for a minor marriage even a decree of nullity would not be required since it would be "a nullity in itself". This division bench judgment was overruled by the full bench of the same High Court in 1977 which held it erroneous to regard an underage Hindu Marriage as void or invalid, since Parliament never intended so. This view of the

full bench has further been supported by the Orissa High Court in the same year.

The age of marriage of Christians in India is governed according to the law in England. The Marriage Act, 1949 of England has fixed the age of marriage of both males and females at 16, and if either party is under that age, the marriage becomes void. The Parsi Marriage and Divorce Act, 1936 prescribes that no marriage of Parsi shall be valid who has not completed the age of 21 years or the consent of her or his father or guardian has not been previously obtained to such marriage. Similarly, Special Marriage Act, 1954 provides that for a valid marriage the male must have attained the age of 21 years and the female the age of 18 years.

There is no doubt that if we raise the age of marriage for females to 20 years, it will decrease the birth rate substantially. But no useful purpose will be served by fixing the marriage age at 20 unless simultaneous measures be adopted to strictly implement it. It will be desirable to amend the marriage laws of all the communities and introduce a uniform rule whereby non-compliance with the age requirement will render such marriage as null and void. No doubt large masses in India are illiterate and ignorant about legislations which will result in large number of such cases coming up before the courts. But practice has shown this to be more effective sanction than mere punishment. Moreover, such underage marriages can be checked by enacting the provision regarding compulsory registration of marriages. No doubt it is difficult to enforce such provisions in more than five lakh villages where neither vital statistics nor the memory of the parents or neighbours is reliable enough to prove the age of spouses, but such an issue can be handled more competently by our lawyers, legislators and policy makers.

MORALITY, LAW AND ABORTION : A PLEA FOR LIBERALISATION

V.K. KAPOOR

The practice of induced abortion is as old as human society. Various societies differ in their attitudes towards the people who perform abortion and those on whom abortion is performed. The majority of societies greet abortion with disapproval and in some cases with active opposition. During recent years the legal problems with regard to abortion have become much greater in scope because of scientific and technical progress. Every abortion, by very definition, results in the destruction of an egg that has been fertilized, has started to grow and would in time, if left alone, become a human baby. Most medical authorities define abortion as the removal of a growing embryo or foetus from the wall of the womb to which it has become attached.¹ As such, it is usually a surgical procedure. It may well have been the first kind of surgery ever invented. Crude methods of getting rid of embryo have been practised for thousands of years in all recorded civilizations. The morality of abortion—is it a woman's privilege or is it murder—has been debated for centuries. Hence the moral and religious controversy over abortion has become the most intense of all the controversies surrounding the subject of birth and population control. For past several centuries, a highly restrictive law of criminal abortion has loomed large throughout the world. The restrictive law was backed by moral values, societal needs and religious dogma in different countries. The technological advances and the emergence of industrialised societies have completely changed the situation and have brought in their train new social problems. To meet the emerging problems of the modern society new social policy is being formulated by various government and non-governmental agencies. The tremen-

* B.Sc., LL.M. (Alig), Lecturer, Faculty of Law, University of Jammu, Jammu.

1. Modi : *Medical Jurisprudence*, p. 325 and Taylor : *Principles and Practice of Medical Jurisprudence*, 10th Ed., Vol. 11, p. 102.

dous rise in the number of illegal abortions, chiefly in Western countries, and the rapid increase in the world population poses a formidable challenge not only to civilization but to human race itself.² To meet this challenge, serious and continued efforts are being made by various nations throughout the world. These two issues together with the movement of the "women's liberation" have brought the law of abortion into limelight. Many research bodies and various committees appointed in many European and some other developing countries have come to the conclusion that the restrictive abortion laws have resulted in resort to clandestine and illegal abortions.³ The problem of illegal abortion in the West has assumed the proportions of genuine scourge. In France, for example, illegal abortions were estimated at between 500,000 and 800,000 in the year 1976. In Belgium thirty thousand abortions are done each year. According to an estimate the figure of illegal abortions few years ago were somewhere near the one million mark. The practice of illegal abortions has given rise to flourishing illegal trade in the hands of unqualified and greedy "back-street abortionists", who charge enormous money for the services rendered by them resulting in discrimination between rich and poor. Thus the restrictive abortion laws in fact have been a source of difficulties and suffering to the poor and unmarried pregnant women. The prohibitory or restrictive laws of abortion are more known for their breaches than their observance.⁴ Every year millions of women defy the laws of their countries by having secret abortions and impairing their health and happiness. There is thus an obvious dichotomy between the actual practice and what the law allows or prohibits. In this situation the repressive practice has become meaningless. The repression of abortion has become anachronistic and even useless, specially in so far it affects the woman who have chosen to have abortion.

-
2. In a study carried out in the United States ten per cent of girls between 13 and 19 have been pregnant at least once - Anne Marie Dourlin Rellier: "Legal Prohibition Related to Abortion and Regulation", *The Symposium on Law and Population, Tunis, 1974*, p. 121.
 3. *Life: An International Report* by Ernest HaveManna and The Editors of Life, 1967, p. 99.
 4. *Ibid.*, p. 101.

It appears from this estimate and from other evidence that there are many millions of women in the world who, finding themselves pregnant against their will, are ready to go to almost any lengths to avoid carrying the pregnancy to completion. This seems to be true of women all over the world, of all religions and in all social classes.

Dr. Selling Neubardt, an American obstetrician, in his book *A Concept of Contraception* has observed :

I believe the basic obligation we have to a new human being is that it be wanted. We will never all be created equal, but we will be able to come closest to that ideal when we are all born wanted. It is therefore logical that I accept abortion. The only ethical and moral position I can take is to allow any woman who does not want to be pregnant to be aborted—to be aborted with dignity, by the physician of her choice, and at a price compatible with other medical services.

Another issue confronting us is the alarming population growth in most of the Eastern and underdeveloped countries of the world. Numerous studies suggest that by the turn of the present century the population of the world would be doubled. India, which constitutes 15 per cent of the world population, adds eleven million babies every year to her 600 million teeming people. This additional burden defies all programmes of economic development. It has been observed that majority of women having a family of two or more children, ask for abortion because they simply find that they cannot face the psychological, social or economic impact of another child. Many countries have remarkably checked their birth rate with the help of induced abortion. According to a U.N. study entitled "Human Fertility and National Development", the induced abortion is probably the single most widely used method of fertility control in the world today and has been associated with declining birth-rate in many countries.⁵ Adoption of liberal abortion law by Japan proved very effective and the post-war birth-rate was almost halved as compared to the pre-war level within a matter of only ten years. There is thus a growing realisation that the liberal abortion laws with other methods of

5. *The Symposium on Law and Population, Tunis, 1974*, p. 213.

birth control can prove the most effective voluntary method of reducing a high birth-rate, ultimately solving the population problem, and it will make the women have the exclusive right to determine freely and responsibly number and spacing of their children.

In 1971 the Indian Parliament passed the abortion law entitled "The Medical Termination of Pregnancy Act, 1971". The Act came into force from 1st April, 1972, modifying the provisions of Indian Penal Code on the subject. Abortion can be performed in government hospitals, government approved places on medical, socio-medical, humanitarian and contraceptive failure grounds. The Act, though progressive in outlook, is very cautious in its approach to the problem. While the Act seeks to strike at the root of age-old prejudices—social, religious or otherwise—against termination of pregnancies and further seeks to remove a social malady, the existence of which is undeniable, its cautious approach would be evident from its provisions.

MTP is not officially declared as a means to be used as family planning device. The Shantilal Shah Committee formed by the government denied that any part of its intention is to press for the legalization of abortion for the sake of population control.⁶

Although officially MTP has not been propounded or accepted as an instrument to be used for family limitation, yet most knowledgeable people including many in the medical profession and in the government take it to be a measure for limiting family size, particularly in view of explanation II in sub-section (2) of Section 3 of Medical Termination of Pregnancy Act, 1971.⁷

Whatever the real purpose of the statute may be, it represents a significant effort to influence widely held social attitudes by legislation and provides an excellent subject to study the role of the law in translating social policy into action. As a consequence

6. Report of Shantilal Shah Committee, p. 70.

7. Explanation II, MTPA: "Where any pregnancy occurs as a result of failure of any device or method used by any married woman or her husband for the purpose of limiting the number of children the anguish caused by such unwanted pregnancy may be presumed to constitute a grave injury to the mental health of the pregnant woman."

the MTP could be used effectively for the success of government's population control policy. Even Shah Committee justifies it as a measure of population control.

The words "Family Planning" connote the control of conception which does not include abortions which take place after conception. However, abortion also can be used as a means to control family size as is being used currently in several countries, in which case family planning or contraception and abortion are in two parallel categories, both of which can lead to population control.⁸

Asit K. Bose states that although the new abortion law was passed ostensibly to support the emancipation of women, the real purpose behind it may be something else—four of the doctors interviewed by him believed that it was enacted to legalize abortion for the purpose of controlling population in India.⁹ The view expressed above is no doubt correct to a great extent as most of the couples take abortion equally as a method of family planning, which will directly check the population growth.

Dr. N.R. Madhava Menon has rightly stated :

It is a known fact that most of the planners and policy makers in this country believe in the importance of population control for effective development planning and have put programmes therefore on a 'war footing'. They consider abortion and family planning as complementary programmes directed towards individual and social health. It is only to get social acceptability and professional support for the new abortion law that the government adopted the strategy of projecting it solely as a public health measure. Besides, it is suggested that when family planning gets fully integrated with basic health services, pregnancy counselling and abortion services will become a necessary component of the total scheme.¹⁰

India is an ancient culture; over the centuries its social and political structure, its laws and its religious institutions have

8. *Supra*, note 6.

9. Asit K. Bose: "Abortion in India: A Legal Study", 16 JILI (1974) p. 544.

10. Dr. N. R. Madhava Menon: "Population Policy, Law Enforcement and the Liberalization of Abortion: A Socio-legal Injury to the Implementation of the Abortiona Law in India", 16 JILI (1974) p. 638.

undergone repeated and profound changes. India is a society of many religions, every religion having its own philosophy and influence upon a particular section of the nation. A survey of the religious concept of abortion and the attitude of different Indian religions towards abortion law would help in understanding the acceptance or opposition of M.T.P.A. by Indian masses. An attempt has thus been made to indicate the doctrines and precepts of various religions towards abortion. An analysis of the views of different religious preachers has also been made with a view to study the various points of views based upon interpretation of religious preachers and texts supporting liberalised abortion law.

The Hindu Position

Some references in "*Atharava Veda*" clearly indicate that abortion was known in "Vedic Age".¹¹ Mention is made in "*Atharva Veda*" of the various charms which would cause or prevent abortions, but it is not clear whether or not such abortions were regarded as criminal.¹²

According to Hahnel, no clear position is taken in the "Indian Brahmin Code *Manau Dharmasastras*" on the actual performance of abortion. But Hahnel is perhaps not justified in saying this¹³, because a clear reference of abortion is found in *Vasistha Dharmasastra*.¹⁴ Other sources suggest that the Hindu position on abortion be traced in the saying in Manu's Institutes,

11. *Atharva Veda*, 2, 4, 1. *Vishkanadha* is the word mentioned in this connection. But its meaning is not very clear. Both ancients and modern jurists have etymologised upon the word and in all instances have arrived at the conclusion that the word refers to some disease.
12. *M. Bloomfield: Hymns of The Atharva Veda* (Edition Oxford 1857), Volume XLII, edited by F. MaxMuller, p. 284. Another word *Jambha* is mentioned, the word is either related with child birth or it seems to refer to some irregular behaviour of foetus, it also refers to some ceremony performance for steadying the womb or foetus. According to Darila, woman herself receives the treatment.
13. Hahnel: "The Artificial Abortion in Antiquity", 29 Arch. Geshecht Med. 224 (1936), cited Gunner K. Gaijerstam (Ed.): *An Annotated Bibliography of Induced Abortion*, p. 111.
14. *Vasistha Dharmashastra*, 5, 8 Bombay Sanskrit Series, p. 18 (which is written as early as the 1st century B. C. although it appears in its final form in 2nd or 3rd century A.D.).

that the "killer of a priest or destroyer of an embryo casts his guilt on the willing eater of his provision".¹⁵

In the *Dharmasastras* abortion in the first four months of pregnancy is called *Srava*, in 5th or 6th month abortion is called *Pata* and from the 7th month of pregnancy onwards it is called "*Prasuit*" or "*Prasava*". In the case of *Srava* mother incurs impurity for three days; in the case of *Pata*, the mother has to observe impurity for as many days as correspond to the months of pregnancy (i.e. 5 days or 6 days), the impurity consists in the mother being untouchable.¹⁶

The *Bhagvad Gita*, the great devotional classic that appears in *Mahabharata* epic, allows a warrior to take life when it is done not for gain or glory but out of duty.¹⁷ In *Mahabharata* it is said that "letting a woman's *ritu* (fertile period) go waste was a sin tantamount to embryo murder".¹⁸

In a Sanskrit dictionary the word *Bhraunahatya* is mentioned, meaning killing of an embryo and further the word "*Braunahtym*" means the activity and duty of a person who performs abortion.¹⁹ It indicates that even during those ancient periods, there were specific qualified persons whose duty was to perform abortion under certain grave circumstance or conditions provided for. Such persons were exempted from any sinful liability.

Dinesh C. Pande states that "the methods of inducing abortions are described as premature births which are brought about by food or drink that is too heavy, warm or pungent, by violent movements and exercises, by a direct blow to the abdomen, etc. The treatment for preventing abortion is also mentioned in Vedic age. The knowledge and practice of abortion are

15. G. C. Hawthton (Ed.) II: "*Manav*" *Dharmashastras*, *The Institute of Manu*, Chap. VIII, p. 317.

16. P. V. Kane: *History of Dharmashastras* IV, p. 275 (*Parasara* III 16 *Sadasiti* verse 9).

17. Franklin Edgerton (Trans): *The Bhagvad Gita* (New York, Harper and Row, 1964) pp. 12-13.

18. Dinesh C. Pande: "Some Inhibiting Factors in the Implementation of the Medical Termination of Pregnancy Act, 1971....A Study of Acceptability", 16 *JILI* (1974) p. 663.

19. Panini: "*Sanskrit Dictionary*", 5/4, p. 174.

referred to by the various ayurvedic texts wherein natural and induced abortions are discussed in detail."²⁰

But there does exist a general bias against the practice of abortion in certain classical principles and longstanding customs of Hinduism. The principles of "Ahimsa" would run counter to abortion. According to Gandhiji, "a votary of Ahimsa therefore remains true to his faith . . . if he shuns to the best of his ability the destruction of the tiniest creature, tries to save it and thus incessantly strives to be free from the deadly evil of 'Ahimsa'."²¹ Even the practice of artificial birth control seemingly less of a violation of *Ahimsa* than abortion seemed to Gandhiji morally reprehensible. The Jains also follow the same principle of *Ahimsa*. But present moral values are different which suggest and strongly favour a more liberalised attitude towards abortion for the welfare of society and nation, Callahan has very rightly observed :

Within the Hindu tradition itself, to sum up, one may argue that there is a bias against abortion based on the three sacraments relevant to the gestation period, as well as on the laws of Manu (keeping in mind that the law's sanctions against abortion applied only to Brahmins) and on the principle of *ahimsa*. On the other hand, laws are not usually framed without some necessity for their existence, including laws against abortion. Therefore, while acknowledging some bias against the taking of life, and for the continuity of the family, in the Hindu tradition, we would still have to conclude that with regard to abortion there has been as much divergence between thought and practice in India as there has been in the West. In any case, the classical principles and traditions of Hinduism do not seem to have generated a strong cultural basis for contemporary opposition to more consistent abortion laws.²²

Islamic view

The Muslims constitute an important minority group in India. It is the second largest religion followed in India, whose

20. Dinesh C. Pande, *supra*, Note 8, p. 662.

21. Mohandas K. Gandhi: *An Autobiography* (Boston, Beacon Press, 1957) p. 349.

22. Danial Callahan: *Abortion, Law, Choice and Morality*, 1970, p. 155.

religious attitude towards a legal instrumentality validating miscarriage must be of significance in evaluating the efficacy of the legislation.

Shariah, what is generally understood to be "Islamic Law", is a collection of laws derived from diverse origins which have been forced into a single religious mould and elaborated to the utmost by "immense labour and dialectical acumen. The word "Shariah" is derived etymologically from a root meaning road or path and it signifies the road or path that leads to God.²³

Sources of *Shariah* are the main sources of Islamic jurisprudence.²⁴ There are four principal roots of sources for Islamic Jurisprudence, the *Koran*, the *Sunnah*, the *Ijma*, the *Qiyas*.

Authoritative Islamic texts vary in their approach to the general issue of family planning by means of abortion and other devices.

Regarding foetal growth Usman and Ali have deduced seven stages of its development from the following *Koranic* verses :

Man we did create from a quintessence (of clay) ; then we placed him as (a drop of) sperm in a place of rest, firmly fixed ; then we made the sperm into a clot of congealed blood ; then of that clot we made a (foetus) lump ; then we made out of that lump bones and clothed the bones with flesh ; then we developed out of it another creature. So blessed by God, the best to create.²⁵

Most of the Moslem jurists agree, however, that the soul is not created when the embryo has not yet taken human shape. This is usually four months (120 days after conception). But Maliki

23. Visey—Fitzgerald considers *Shariah* to be more than what in English is commonly termed "Law". Rather it is the "Whole Duty of Man". Thus under *Shariah* comes "moral and pastoral theology and ethics, high spiritual aspiration and the detailed ritualistic and formal observance, all aspects of law, public and private, hygiene and even courtesy and manners". See Visey—Fitzgerald: "Nature and source of *Shariah*", in law in the *Middle East*, Vol. I, pp. 85-86.

24. The science of jurisprudence or the scientific study of *Shariah* is called *Fiqh*.

25. The Holy *Quran* (Translated: A Yusuf Ali), Volume II, pp. 875-876 (S. XXIII, Vv. 12-13-14).

school on the other hand restricts the period to forty days (instead of 120).

In doctrine the Islamic religion forbids the killing of soul. Abortion in the sense of destroying a baby after the creation of the soul, that is, when the foetus has acquired a life of its own is therefore absolutely forbidden.²⁶

Regarding abortion, a division of opinion exists as to whether before the foetus has gained a life of its own, abortion may be permitted with or without a valid cause. Dr. Madkour summarised the different views regarding abortion before the creation of soul as follows:²⁷

- (I) According to some jurists it is permitted without a reason, though some of Hanafi's jurists and some of the Shafi'e's make it conditional with a cause.
- (II) It is permitted with indifference (*Mubah*), only with a cause, though it is considered *Makruh*, i.e. reprobated. This is the view of al-Hanafi and some of al-Shafi'e.
- (III) According to some of the *Maliki* School it is reprobated, *Makruh*.
- (IV) According to the *Maliki* School it is *haram*, i.e. it is absolutely forbidden.

But after the foetus has acquired a life of its own, that is, after the fourth month, there is no disagreement among the Muslim jurists as regards the absolute prohibition of abortion. A penalty is imposed (even though he is a father) since it is then considered as crime of murder.

For this they quote the *Koranic* verses:

"Nor take life—which God has made sacred . . . except for just cause."

26. Magdi M.el. Kammash: "Islamic Jurisprudence" in *Population and Law* (Edited: Luke T. Lee and Arthur Larson) Chap. 12, page 313.

27. Mohammad Salam Madhkour: *The Islamic view of Birth Control: A comparative study of the Muslim Schools* [Dor Al-Nahoe Al-Arabia Cario, 1965 p. 93 (in Arabic quoted in *Population and Law*) *supra*, note 26 at p. 313].

Thus in case the pregnancy presents a danger or threat to the mother's life (if certified by the specialist), the jurists have ruled in favour of abortion. In other words, the life of the child not yet born is to be sacrificed in order to save the mother's life since she is the source of life for the unborn child as well as others to come.²⁸

It has been stated that "it is permissible to terminate pregnancy in the early months before foetal movement occur if the health of the mother is endangered".²⁹ The use of medicine to prevent pregnancy temporarily is not forbidden by religion especially if repeated pregnancies weaken the women due to insufficient interval for her to rest and regain her health.³⁰

One entry in the collection of *Bukhari* has given rise to some doubts in Islamic policy on abortion. It states that the soul does not enter the body of the foetus until the 80th day of gestation and has been cited to justify interruption of pregnancy within this time limit. The Moslem jurists in general condemned the use of abortion. In the other recent literature abortion has been considered permissible in some cases if it is performed before the foetus has been instilled with soul, which occurs at various periods after conception, according to various authors.³¹

The Muslims who held an opinion that abortion is against Islamic religious preaching, support their views by quoting the

28. Magdi M-el Kammash, *supra* note 25 at p. 313.

29. Journal of the Egyptian Medical Association, Vol. 20, No. 7 (July 1937), pp. 54-56.

30. "Mohammed Abdul-Fattah-El-Enani" (legal opinion). Chairman Fatwa Committee, at Al-Azhar University expressed essentially the same opinion in responding to question No. 6746 (March 10, 1953). This *Fatwa* is reproduced in Muslim Attitude Towards *Family Planning*, *supra*, note 26, p. 317.

31. *Islam and Birth Control*, 50 confluent 302 (1966), quoted in Gunnar, K. Geijerstam, *supra* note 13, p. 111. Professor Mohammed Mekki Naciri of the Quaraouyne University, Fez, expressed the opinion that if an abortion takes place after the fourth month, it is considered a veritable assassination and is judged as such by Muslim jurisdictions. He however, added that if it is established that the continuance of pregnancy, even when the foetus has reached an advanced age, may lead to the death of the mother and that abortion constitutes the sole means of saving her from danger, then in that case abortion is allowed. [Based on a speech delivered at the National Seminar on Family Planning, Rabat, Morocco (Oct. 11 to 14, 1966)]

verse from the Holy *Quran* saying that :

Kill not your children for fear of poverty ; We shall provide sustenance for them as well as for you.³²

The abovementioned verse must be read in the light of barbaric custom of female infanticide which was prevalent among the Arabs at that time. The Holy *Koran* declared as crime the practice of infanticide. According to Hazrat Ali, an infanticide cannot take place until the foetus has passed through the seven stages of its growth as narrated in the Holy *Quran*.

Keeping in view the historical review of Muslim jurisprudence one comes to the conclusion that paradoxically Muslim scriptures seem to support family limitation in many passages. But the general Muslim population believes abortion to be against Muslim teachings. But considering abortion as family planning measure and opinions of different schools justifying pregnancy termination until the 80th or 120th day of gestation suggest a vivid attitude of Islamic law towards relaxations for abortions if it is in the interest of social welfare for the proper care and maintenance of mother and her existing children. The abovementioned sources rather give an inference that the view that abortion can be equated to the killing of a life which would make it a profane act does not seem to have a theological sanction.

The Roman Catholic Position

The brief survey of Hindu and Islamic religious attitudes towards abortion brings us to the Roman Catholic position. The Church of Rome remains opposed even to therapeutic abortion. "Abortion is not morally permissible even to save the life of the mother."³³ In the *Didache*, a very early and authoritative source of Christian law, (80 A.D.), abortion was treated as a grievous sin and ranked in importance with those acts forbidden by the "Ten Commandments". Abortion is treated with equal

32. Holy *Quran*, Chapter XVII, verse 31 (Translated A. Yusuf Ali) Vol. II, p. 703.

33. Glanville Williams: *The Sanctity of Life and the Criminal Law*, Chap. 6, p. 177 [the prohibition of therapeutic abortion was reaffirmed in an encyclical of October 26, 1951 (and occasioned many adverse comments in the non-Catholic press)].

stringency in the Epistle of Barnabas (C. 138), which said, quite flatly, you shall not slay the child by abortions.... "Clement of Alexandria" used equally strong language in 215, stating that abortions "destroy utterly the embryo and with it, the love of man".³⁴ Pius XX's successor, John XXIII, carried forward the fundamental principles of Roman Catholic religion in "Materet Magistra" (1961). He wrote that "human life is sacred; from its very inception, the creative action of God is directly operative . . . by violating His laws, the Divine Majesty is offended, and humanity degraded, and likewise the community itself of which they are members is enfeebled". The Second Vatican Council which Pope John stated in the "Pastoral Constitution" on "The Church in the Modern World", that from the moment of its conception life must be guarded with the greatest care, while abortion and infanticide are unspeakable crimes.³⁶ After the Council Pope Paul VI in his encyclical on birth control "Humanae Vitae" (1968) said that "directly willed and procured abortion, even if for therapeutic reasons, are to be absolutely excluded as illicit means of regulating birth".³⁷

The following successive statements make it clear that at least two exceptions to the prohibition of abortion remain: abortion in the instance of an ectopic pregnancy and in the instance of a cancerous uterus. In Noonan's eyes, these exceptions are taken to prove that the present teaching of the church is something less than an "absolute valuation of foetal life".³⁸ Both exceptions are justified on the grounds that the direct intention of the act is to save the woman, indirectly these acts kill the foetus, but this is not their direct intention. The Jesuit Thomas Sanchez (1550-1610) argued that in particular, if the foetus was not ensouled and the woman would die without an abortion, then abortion was "more probably" lawful, the foetus in the instance being an "invader and attacker".

34. Daniel Callahan: *Abortion: Law, Choice and Morality*, Chap. 12, p. 410.

35. Daniel Callahan, *op-cit* Chap. 12, p. 415.

36. *Ibid.*, p. 415.

37. *Ibid.*, p. 415.

38. Daniel Callahan, *supra*, note 26, p. 415.

In 1591 Pope Gregory XVI³⁹ rescinded all of the penalties specified in *Effraentam* with the exception of those which had applied to an ensouled foetus. In 1679, Pope Innocent XI's "Holy Office" condemned as scandalous and in practice dangerous two propositions.⁴⁰ While Noonan states that "it is lawful to procure abortion before ensoulment of the foetus lest a girl detected as pregnant be killed or defamed.... It seems probable that the foetus (as long as it is in the uterus) looks a rational soul and being first to have one when it is born; and consequently it must be said that no abortion is homicide".⁴¹

In fact the practice of artificial abortion is as old as history, primitive people all over the world have been found to practise abortion as well as infanticide in order to prevent an increase in their number. In Greece and Rome abortion was practised not only for economic reasons but even from shame at the illegitimacy of child, or fear that childbirth would detract from the mother's appearance.⁴² But like Hindu and Muslim religious concepts Roman Catholic religion permitted such abortions under very extreme circumstances only when the soul had not entered the foetus. It was formerly believed by many that the foetus did not begin to live until some time after conception had taken place, but the exact time was not agreed and such theories as were put forward were naturally devoid of any experimental or rational basis. Many theories were put forward, but the later Roman view considered 40 and 80 days after conception for the male and female foetus respectively.⁴³

Thus Saint Augustine finally drew a distinction between embryo "*Inanimatus* and *Animatus*" i.e. (formed and unformed foetus). Before the embryo has been endowed with a soul it is *embryo informatus* but the *embryo formatus* (i. e. organized in human shape) is an animate being and to destroy it is a murder, a crime punishable with death . . . the distinction between the "*embryo formatus*",

39. Daniel Callahan, *supra*, note 26, p. 412.

40. Daniel Callahan, *supra*, note 35, p. 413.

41. *Ibid.*, p. 413.

42. Glanville Williams, *supra* note 24, pp. 140, 141.

43. Glanville Williams, *supra* note 33, pp. 141-142. Aristotle put it at about 40 days after conception for the male foetus and about 90 days for the female.

though rejected in some of the earlier canons of the Church, was accepted by Gratian in his *decretum* (about the year 1140). Gratian announced definitely that abortion is not murder if the soul has not been infused into the foetus.⁴⁴ Saint Thoms Aquinas defined the soul as the first principle of life in those things that live, and added that life is shown principally by two actions, knowledge and movement while Blackstone said, 'life begins in contemplation of law as soon as the infant is able to stir in the mother's womb'.⁴⁵ Hence in case of abortion Roman Catholics made a distinction between *embryo informatus* and *embryo formatus*, but the distinction is based upon confused line of demarcation, which makes justification of abortion in an unusual critical circumstance rather an extremely difficult task. Callahan has summed up the views of Catholic position that "(a) God alone is the lord of life, (b) Human beings do not have the right to take the lives of other (innocent) human beings, (c) Human life begins at the moment of conception, (d) Abortion, at whatever the stage of development of the conceptus, is the taking of innocent human life". The conclusion follows: Abortion is wrong. The only exception to this conclusion is in the case of an abortion which is the indirect result of an otherwise moral and legitimate medical procedure (e. g., the treatment of an ectopic pregnancy and cancerous uterus).⁴⁶

But some Catholic theologians have tried recently to work out a fresh Catholic position and approach abortion in the context of a larger attempt to work through a fresh method of moral reasoning, keeping in consideration the welfare of mankind, as Bishop Francis Simons of Indore, in an article called "The Catholic Church and the New Morality", proposes that the "good of mankind", of the welfare of mankind is the ultimate basis of the natural law and the norm by which particular commandments or moral laws are to be judged. In the instance of abortion, the question to be asked is whether an adherence to the law against the killing of an unborn child always contributes to

44. Glanville Williams: *The Sanctity of Life and the Criminal Law*, Chap. 5, pp. 142-143.

45. *Ibid.*, pp. 143-144.

46. *Supra*, note 40, p. 417.

mankind's greater good. Heinz Fleckenstein in his article "Christian Remedies for Medical Hopelessness" has argued that "given the present state of turmoil in Catholic theology, the existing principles are no longer fully adequate and can be taken as general point of view only; this opens the way for a rethinking of abortion dilemmas".⁴⁷ In India the Christians and the Jews are smaller communities, but in a pluralist and democratic countries they are fully entitled to voice their views and work for their approval, but prudence requires that they take into account the prevailing climate of moral opinion and social needs in the country, which certainly favours a liberal attitude towards abortion law.

In philosophical and religious terms much of the argument centers around the questions of when the human soul is formed as a theologian might put it, or in more secular terms, when human life begins. Among those who think in strictly medical terms, it is impossible to find any agreement as to when the life begins. The moment can be thought of as when the sperm first meets the egg, when the sperm penetrates the egg, or when the chromosomes inside the egg and sperm pair, or when the fertilized egg and sperm pair, or when the fertilized egg begins to split for the first time, or when it becomes attached to the wall of the womb, or even at a later stage for in its first six weeks, the embryo has no manifest human characteristics and is indistinguishable from the embryo of a mouse or a monkey. Thus there is no scientific way of settling the old philosophic and theological argument.

The principal religions of the world and of India have greeted abortion with disapproval and in some cases with active opposition, taking it as a 'sin'. Pope Pius XII ordained:

The unborn child is a human being in the same degree and by the same title as its mother. Moreover, every human being even the child in its mother's womb receives its right to life directly from God, not from its parents nor from any human society or authority. Innocent human life, in whatsoever condition it is found, is immune from the very first moment of its existence to any direct deliberate attack . . . the

47. *Ibid.*, pp. 431-432.

life of an innocent human being is unavoidable and any direct assault or aggression on it violates one of those fundamental laws without which it is impossible for human beings to live safely in society.

Basically, however, abortion is not associated with "sin" but rather with "shame", from both the individual and social point of view. A pregnant woman feels ashamed not only in going to her doctor for abortion, but also in having the fact of abortion known to the community and society in which she lives, which explains in part the large percentage of unreported illegal abortions in comparison with the legal abortions despite legalisation. There is much misunderstanding among the masses as regards their religious precepts, under which embryo is considered as human being and its killing by induced abortion as a sin and offence. But this view is perhaps derived in parts from conventional wisdom, otherwise no religion has totally forbidden abortion. We may thus conclude that religious teachings, dogmas and traditions existing in India, in general, run contrary to the use of liberal induced abortions. But these prejudices have to be fought on social, religious or political plains and the success or failure of statutes such as the abortion law are thus largely dependent on education of the masses. Moreover, abortion even if an evil does take place. Hence a regulatory law which allows abortion to take place under proper medical conditions not in order to save only the life of another person (pregnant woman) always but rather to preserve the health of pregnant woman for the greater happiness of other bodies (family) and welfare of whole society, can never be opposed by any religion or moral codes.

There is scarcely a religion, association or organisation in India, which believes that it has discovered the perfect solution to the legal, social and medical problems of abortion. According to official pronouncements the MTPA has been conceived on the basis of three reasons, health measures, humanitarian grounds and eugenic grounds. The MTPA in Section 3(2)(1) and Explanations I and II of Section 3 has allowed the termination of pregnancy almost on the basis of abovementioned reasons.⁴⁸

48. S. 3, MTPA: (1) Notwithstanding anything contained in the Indian Penal Code (45 of 1860) a registered medical practitioner shall not be guilty of

A Critical Analysis of MTPA

The implementation of the MTPA has negative and positive aspects, which originate due to the interpretation of the language of the Act. In some important areas the statutory language is vague. It does not, for instance, define the term "grave" as used in Section 3(2) of the Act as "grave injury to her physical or mental health". Again, in Explanation I of Section 3 of the Act words have been used in cases of rape, "grave injury to the mental health of the pregnant woman". The words "substantial risk" and "health" particularly "mental health" contain no definition. Nor does the statute contain any logical definition

any offence under that code or under any other law for the time being in force, if any pregnancy is terminated by him in accordance with the provisions of this Act.

(2) Subject to the provisions of sub-section (4), a pregnancy may be terminated by a registered medical practitioner,—

- (a) where the length of the pregnancy exceeds twelve weeks, if such medical practitioner is, or
- (b) where the length of the pregnancy exceeds twelve weeks but does not exceed twenty weeks, if not less than two registered medical practitioners are,

of opinion, formed in good faith, that—

- (i) the continuance of the pregnancy would involve a risk to the life of the pregnant woman or of grave injury to her physical or mental health; or
- (ii) there is a substantial risk that if the child were born, it would suffer from such physical or mental abnormalities as to be seriously handicapped.

Explanation I.—Where pregnancy is alleged by the pregnant woman to have been caused by rape, the anguish caused by such pregnancy shall be presumed to constitute a grave injury to the mental health of the pregnant woman.

Explanation II.—Where any pregnancy occurs as a result of failure of any device or method used by a married woman or her husband for the purpose of limiting the number of children, the anguish caused by such unwanted pregnancy may be presumed to constitute a grave injury to the mental health of the pregnant woman.

- (3) In determining whether the continuance of a pregnancy would involve such risk of injury to the health as is mentioned in sub-section (2), account may be taken of the pregnant woman's actual or reasonably foreseeable environment.
- (4) (a) No pregnancy of a woman, who has not attained the age of eighteen years, or who, having attained the age of eighteen years, is a lunatic, shall be terminated except with the consent in writing of her guardian.
- (b) Save as otherwise provided in clause (a), no pregnancy shall be terminated except with the consent of the pregnant woman.

of these terms. Hence in determining whether condition of the woman is "grave" or a "substantial risk" is involved in a particular case and to assess the "mental health" of the woman, doctors will have to make their individual judgments, which will result in giving individual practitioners virtually unlimited leeway to perform or to refuse to perform abortions.

Dr. M. Zakaria states: "Difficulties may arise in the interpretation of the word 'health'. The use of this word is not restricted to mere freedom from any disease or illness but sometimes goes behind that. It may mean the same as the World Health Organisation's definition, a state of complete physical, mental and social being and not merely absence of disease or infirmity".⁴⁹

Dr. N.R. Madhava Menon states that the MTPA has adopted very liberal and possibly vague criteria for abortion. As some medical men themselves contend, the concepts of "mental health" or "foreseeable environment" of pregnant woman are extremely vague and certain to be abused. Besides, they often raise problems of medical ethics and physicians who interpret them too liberally might expose themselves to unpleasant consequences.⁵⁰ The Act permits the doctor to perform abortion when the pregnancy is the result of rape. It may be pointed out that the term "rape" is a legal concept for which the doctors are not competent to make judgment.

The conditions which determine whether or not an abortion is a legal abortion have been laid down in Sections 3 and 4 of the MTPA.⁵¹ Considering the nature, vagueness and flexibility of

49. Dr. M. Zakaria Siddiqi: "Abortion Law: An Analysis of the Proposed Reforms", MLJ Vol. II (1971), p. 42.

50. Dr. N. R. Madhava Menon: "Population Policy, Law Enforcement and the Liberalisation of Abortion: A Sociological Inquiry into the Implementation of the Abortion Law in India", 16 JILI (1974), p. 639.

51. S. 4, MTPA 1971: "No termination of pregnancy shall be made in accordance with this Act at any place other than—

(a) a hospital established or maintained by government, or

(b) a place for the time being approved for purpose of this Act by government.

these conditions the doctors feel that a medical practitioner is given wide discretion to decide whether or not to perform an abortion in any particular case. The absence of legal definitions of these terms leaves individual doctors with very wide discretion in determining what really is a matter of life and death. The statute does not lay down any firm criterion for the hospitals or the places in which abortions are to be performed beyond specifying that they be "approved".

The definition of the expression "registered medical practitioner" makes it obvious that the practitioner of any system of medicine other than the modern scientific system of medicine will not fall within the definition of "registered medical practitioner".⁵² The practitioners of Ayurvedic, Homoeopathic, Unani or other systems of indigenous medicine will not, therefore, fall within the scope of the expression "registered medical practitioner" and consequently they would not get any protection under the Act, if they terminate any pregnancy, not even where such termination is immediately necessary to save the life of the pregnant woman.

Dr. N.R. Madhava Menon states that "abortions conducted by persons other than registered medical practitioners as defined in Section 2(d) of the MTPA or in places other than those prescribed for the purpose under the MTPA are illegal. This Act thus excludes doctors of all other indigenous systems such as Ayurvedic, Homoeopathic and Unani. This may result in hardships to the rural people who constitute majority of the Indian population and who are largely served by non-allopathic medical practitioners".⁵³

Conclusion and Suggestions

The problem of abortion and women's right to get aborted

52. Section 2(d), MTPA: "registered medical practitioner" means a medical practitioner who possesses any recognised medical qualification as defined in clause (h) of S. 2 of the Indian Medical Council Act, 1956 (102 of 1956), whose name has been entered in a State Medical Register and who has such experience or training in gynaecology and obstetrics as may be prescribed by Rules made under this Act.
53. Dr. N. R. Madhava Menon: "Population Policy, Law Enforcement and the Liberalization of Abortion: A Socio-Legal Inquiry into the Implementation of the Abortion Law in India", 16 JILI (1974), p. 639.

has crossed the national boundaries and has assumed the proportion of a world problem because of three major issues, namely, high rate of illegal abortion, induced abortion as a method of birth control, and induced abortion as a part of (women's) "human right". In India though the third issue has not received much attention but the "Tehran International Conference on Human Rights" declared in 1968 that parents have a basic human right to determine freely and responsibly the number and spacing of their children.⁵⁴ But abortion presents a difficult problem in this regard. No government representative appeared to have characterised voluntary abortion as a "Human Right". Yet many women organisations have claimed their right to abort in cases of unwanted pregnancies. Better able to be aware of their responsibilities, the majority of women wish to master their own destiny and believe that it is up to them to make decision about bringing a child into the world. As early as in 1945, Stella Brown said that "woman's right to abortion is an absolute right. Abortion should be available for any woman without insolent inquisition or ruinous financial charges, for our bodies are our own".⁵⁵ That was a bold statement in those days, and the arguments since that time have, with one or more variations, persisted in pressing the just cause of women's right. Marya Mannes has said that "this most important one of all has so far been denied the right to control what takes place within our own body. This is our citadel, our responsibility, our mental, emotional and physical being".⁵⁶ The aim of granting abortion as women's right is to free women from a needless form of slavery and to make a woman the master of her own body. The emancipation of women is not complete until women are free to avoid the pregnancies they do not want.

The discussion makes it clear that before the realization and acceptance of these social realities and women's right, so as making abortion laws more liberal, realistic and timely, there had been a very strong opposition by many groups almost in every

54. Final Act of the International Conference on the Human Rights, U. N. Sales No. E. 68, XIV 2, pp. 2 and 14 (1968).

55. Daniel Callahan: *Abortion: Law, Choice and Morality*, 1971, p. 460.

56. *Ibid.*, p. 461.

nation. The oppositions were based on religious, moral and ethical values. Today, however, in nations as a whole, religion is nowhere a decisive factor in the practice of abortion except to deter passage of more liberal laws. Abortion decisions bring into play three factors, i.e., issues of "body life", "person life" and "species life", (unborn human life, pregnant woman's welfare and integrity and over population respectively). The whole problem of abortion arises because of the desires or needs. And the whole problem of devising a legal policy arises because in every society there exist women who want or believe they need abortion. The legal question thus becomes whether these desires or needs should be recognized and under what conditions. While a moral policy generally speaks to preserve all "human life" except in case of a grave danger to life of mother, i.e. under strict medical indications, while logic speaks that moral policy should in general take into consideration the only one life, that is the preservation of "human life", the better preservation of human race can only be achieved when its social needs and reasonable desires are taken into consideration and then awarded the better legal protection, which in case of abortion can only be fulfilled by liberal and realistic abortion laws.

The discussion has amply established a basis for more reforms in the already liberalized laws of abortion. Such reforms are needed both in substantive law and the procedure to achieve the desired objectives. Suggestions have been, therefore, made here to make the Indian law of abortion a dynamic process.

For the operation of an effective and safe abortion laws in India and the abortion laws which can better protect rights of women, the abortion on demand should be available to every Indian woman irrespective of any grounds or permission up to the period of first twelve weeks from the day of conception. This procedure will definitely prove very effective in decreasing the birth-rate and in checking the growing population. China, the Soviet Union, the United States and Japan represent the most successful nations having effective abortion laws of the world. By permitting abortion on demand the country will gain immense success in checking the increasing birth-rate and number of illegal abortions.

Secondly, when the pregnancy has passed beyond the period of 12 weeks abortion should only be permitted on strict medical grounds i.e. as provided in Section 3, sub-section (2), clause (b) (1)(II) of MTPA.

India is a demographer's nightmare, embodying as painfully as any country in the world all the problems of overpopulation, poverty, undernourishment, a shortage of housing, educational and medical facilities and socio-economic stress on the women due to excessive number of children because major portion of Indian population lives in the rural areas with minimum facilities provided by the government. Hence for the popularity and effective implementation of any law in the country, its popularity in villages and rural areas is very essential. There must be an intensive drive to educate the women of rural areas about the existence, scope and object of the abortion laws of the country. The term "registered medical practitioner" authorised to perform abortion should also include qualified and registered Ayurvedic and Homoeopathic doctors because in rural areas it is mostly Ayurvedic or Homoeopathic doctors who treat the villagers. One can understand that India being a developing and poor country cannot provide appropriate and effective allopathic medical facilities and allopathic doctors in remote and extreme rural areas.

The proposed suggestions signal towards the recent advance in abortion techniques especially in many developed countries of the world. Such efficient abortion techniques and the proposed suggestions with a mass movement to educate and inform the Indian women about such "social laws" (specially in rural areas) will render valuable results in changing their attitude towards abortion. Steps to formulate not only liberalised but widely popularised and medically systematised abortion laws and procedures will definitely protect the physical, social and mental welfare of the women in our country.

SECTION 5
PROTECTION OF CHILDREN

VAGRANCY, BEGGARY AND STATUS CRIMES

B. B. PANDEY

Introduction

Though hard work, industry and self-respect are extolled as virtues in almost every society, but still each society confronts in different degrees the problem of coping with the idlers, social parasites and others who lead disrespectful lives. Such non-conformist patterns of existence are generally understood to be inspired by hedonistic motivations that aim at minimizing effort and labour for survival. Such ways of survival assume diverse forms which invariably involve living on the efforts and earnings of others. Social parasitism or indolence is at times motivated by altruistic spirit or religious sentiments also. People renouncing the world and leading the life of a *Sadhu* or *Sanyasi*, *Fakir* or *Darvesh* are instances on the point. Furthermore, a large section of the population may be compelled to survive by indulging in trades and activities which are designated as undesirable by the dominant ruling group. This category includes the traditional professional groups like *Sapera*, *Kertania*, *Bazigar*, *Nat* and others who make their living through 'suspect' means.¹ Karl Marx described this assorted non-conformist population in these words:

Alongside decayed routes with dubious means of subsistence and dubious origins, alongside ruined and adventurous off-shoots of bourgeoisie, were vagabonds, discharged soldiers, discharged jail birds, escaped galley slaves, swindlers, monte-banks, *lazzaroni* pick-pockets, tricksters, gamblers, *mague reaus*, brothelkeepers, porters, libereeti, organ-grinders, rag-pickers, knife-grinders, tinkers, beggars—in short, the whole indefinite disintegrated mass thrown hither and thither, which the French term *la bohème*².

* Faculty of Law, University of Delhi.

1. For a country like India, which is caught up in the whirl of cultural change, this category acquires special significance.
2. Karl Marx: "Eighteenth Brumatra of Louis Bonapart" in *Marx and Engels Selected Works in One Volume*, 1968, pp. 96-179.

The nature and the magnitude of the above described problem of non-conformism in matters of the ways of survival may vary according to the form of the political organisation and the stages of economic development of the society in question. Thus the issues relating to right or wrong ways of survival become closely linked with the character and peculiarities of the social organisation itself. A loosely organised society might accord a wider freedom in the matters of the ways of living, though in fact in such societies the choice may be very limited on account of the backward stages of development. Similarly the degrees of commercialization of the land also determine the ways of survival substantially. Thus so far there was a low degree of commercialization of land, people were free to use land in any way they liked, but once land become a commodity the landowning class began interfering in many community activities centered around land. Even innocuous activities like grazing cattle, raising poultry, picking dry wood and collecting fodder, which provide a substantial means of survival to a large section of rural poor, become suspect and prohibited, once land and forest wealth was commoditised.³ Furthermore, the social attitudes in respect of different activities might vary in accordance with the class position of the parties and social hierarchy. For instance, the parasitic activities of certain upper classes like moneylending or landlordism, which involved living on the labour and efforts of others, was considered as a trade or a lawful way of survival. Similarly, religion and social practice also accorded wide privilege to upper classes for leading leisurely existence and indulging in various sorts of idle activities in the name of religion and spirituality.

Idlers and Social Parasites in the Ancient Period

The concept of idle existence or parasitism in the ancient societies should be understood in its socio-economic context. The ancient societies were generally pre-feudal or feudal in character in which the members lived in closely knit kinship groups or village communities. This form of existence treated any member's

3. See Marx, Karl: "Debates of the Law of Theft of Wood" in the proceedings of the Sixth Rhine Province Assembly, Karl Marx and Frederick Engels: *Collected Works*, Vol. 1, New York: International Publishers, 1975.

disadvantage of biological (deformity or sickness) or social (resourcelessness and destitution) nature as a matter of concern for the other members of his group or the village community as well. They were supposed to provide the necessary support and succour to offset the disadvantage. This collective spirit of early community existence might have crystallized into the religious practice of charity and almsgiving. These practices were given adequate social support by being extolled as a virtue of self-negation or search for higher truth. The primary reason for such extollation of charity might have been to encourage people to part with their excessive acquisitions with a view to keeping down the discontent and rancour that might be the result of unequal distribution and destitution. Even such public charity or charity by the strangers would have come only as a second line of social security, after the family group or the immediate community had failed to give the required support. Furthermore, being in primitive stages of development, the ancient societies had no definite notions about work or industry in the modern sense. The family or the community lived by hunting and other primitive modes of food gathering or simple agricultural operations that needed little division of labour. Therefore, the difference between an industrious and a non-industrious member was hardly perceived. There was no developed notion of the social consequences of indolent conduct.

Idlers and Social Parasites in the Modern Period

The modern society, particularly in the post-capitalist mode of production stage, treats idlers and parasites as a threat to the socio-economic order. The idler or social parasites not only fail to contribute their labour towards production process but also set a bad example for others. The modern society's attitude towards this class is amply reflected in the following observation of Leon Radzinowicz: "Seen as a threat to morality and industry vagrancy could not but be especially infuriating. For in the eighteenth and early nineteenth century a strong moral indignation reinforced the feeling against vagrants. At a time when the disciplined industry of the poor seemed so essential to economic development exhortations to hard work, condemnation of improvidence, criticism of indiscriminate relief combined to harden

the attitude to professional beggars and imposters... Their freedom and irresponsibility were bitterly resented. Idleness, 'a reluctance on people to be employed in any kind of work', was regarded as the basis of both vagrancy, mendicity and a high offence against public economy as well as against good order".⁴

The anonymous and impersonal mode of living in the modern societies in which the misery and suffering became the sole concern of the individual himself or his immediate family, the idle or parasitic way of existence, came to be regarded as a significant social problem. This is because the basic needs would compel the destitute population to fall back upon the resources of the better-off classes and create hardships for them. In this way the social parasitism in various forms acquired a different character and dimension in the post-feudal modern societies, and in a sense can be described as a typical product of the urban, impersonal and anonymous mode of existence.

The phenomenon of social parasitism is seen as a social evil for diverse reasons like: (a) as a problem of public health, (b) as a problem of decency and morality, (c) as a law and order problem, (d) as a condition leading to the degradation of the labour force.

Social parasitism in the form of vagrancy, beggary and destitution was identified as a public health problem for the first time in India during the second world war, when large mass of rural migrants comprising of unemployed, sick and lepers thronged the air raid shelters in Calcutta. Social groups concerned with civil health like the Rotary Club, Salvation Army and the European Association agitated and demanded immediate action to deal with the menace. The main thrust of their argument was that sick and ailing population in such a large number posed the danger of onspread of disease and outbreak of epidemics. Closely related to the reason of public health is the reason of decency and beauty. The presence of the vagrants and destitutes in the tourist spots and other public places visited by local and

4. Radzinowicz, Leo: *A History of English Criminal Law*, Vol. 4, 1968, p. 17.

foreign tourists is treated as an affront to the urban sense of beauty and decency. Beggars hanging around places of worship and other tourist spots are seen as scars and pimples in the otherwise well laid out urban landscape. The U. S. Supreme Court highlighted this reason in *City of New York v. Miln* in these words: "It is as competent and as necessary for a State to provide precautionary measures against moral pestilence of paupers, vagabonds and possibly convicts, as it is to guard against physical pestilence..".⁵ Furthermore, social parasitism is also considered as a precursor to other forms of criminality. In this sense vagrants, beggars and destitutes are seen as potential law and order risks. The law and order consideration is a very significant plank of the overall modern State policy towards social parasitism. Finally, social parasitism is also linked with the production process. Parasitic way of life is considered to be an attack on the ideology of hardwork and industry, it distracts the worker from his resolve to put in his best effort in the production front. This reason has special relevance in capitalist social orders, which are centered mainly around the idea of production and surplus profits.

I. Who is a Status Offender

Status offenders are persons whose condition or behaviour is designated by the laws of a State or a nation to be violative of accepted customs or standards of that society or community. Such conditions or behaviours would not ordinarily fall within the accepted description of crimes, particularly in respect of their blameworthiness quality and social harm element. Crimes of this category mainly depend upon the value judgment of the dominant political group in the society which is assumed to be acting in the larger interest of the society. Thus in many societies a woman is a status offender if she makes her living by receiving compensation for sexual favours to men. Likewise, under some system, seeking employment and visiting areas not meant for certain class of persons may turn a person into a status

5. 36 US (11 Pet) 102, 142 (1837), cited in Cable Foote: "Vagrancy-type Law and its Administration", *Crime and The Legal Process* (Ed. William J. Chambliss), MacGraw Hill, N.Y., 1969, p. 309.

offender. Similarly, selling obscene literature or indulging in suspect trades and activities are status offences in most of the jurisdictions. In the modern societies vagrancy and beggary are the most commonly known instances of status offences. These status offences cover within their ambit a wide variety of conditions or patterns of behaviour that are considered socially undesirable. This category of status offences presents special difficulties at the policy formulation and enforcement stages. *Ledwith v. Robert*⁶ amply highlights these issues. The case concerned the petition of two window cleaners, who were arrested by the defendant, constables in the Liverpool Police Force, in terms of the Vagrancy Act, 1824 and the Municipal Corporations Act, 1582. The Acts in question gave wide powers to the police to arrest and apprehend any person loitering with intent to commit felony or being idle or disorderly.⁷ Thus a person committed an offence in terms of the provisions by: (1) failing to maintain his family when able to do so; (2) becoming chargeable on a parish from which he shall have been legally removed by order of justices; (3) if a pedlar, by wandering abroad and plying without licence; (4) if a prostitute, by wandering in the public street and behaving in a riotous and indecent manner; (5) by wandering abroad or taking up a position in a public place to beg, or causing children to do the same. Scott, L.J. aptly summarised the objectives of formulating such statutes and creating such offences in the following words:

In my view these two expressions both refer to members of a class once prevalent in England to an extent which made it for four or five centuries a major political problem, a problem which taxed the forces of law and order to the uttermost and produced a long succession of repressive statutes. Those laws were framed exclusively in relation to that particular class of the community and had three purposes. The class consisted of the hordes of unemployed persons, many of them addicted to crime, then wandering over the face of the country; and the purposes were (a) settlement of ablebodied in their own parish and provision of work for them there; (b) relief for aged and infirm, that

6. (1937) 1 KB 323.

7. Ss. 3, 4, 5 of the Vagrancy Act related to the "idle and disorderly persons", "rogues and vagabonds" and "incorrigible rogues".

is, those who could not work; and (c) punishment of those able-bodied who would not work.⁸

II. Rationale of Status Offences

The creation of offences or crimes, in the legal sense, presupposes the existence of recognised political authority or the State that acts in the general interest of the society. This centralised authority performs the task of identifying patterns of behaviour and activities that are opposed to the accepted notions of morality or the larger good of the society. Thus the creation of a wide variety of status offences comes well within the State's concern for the welfare of the society it governs. Generally, status offences are justified (a) as a measure of social defence, (b) as a measure of social security, (c) as a punitive measure.

As a Measure of Social Defence.—It is assumed that behaviours designated as status offences adversely affect the interests of the society. Thus status offences like vagrancy and beggary are considered detrimental to the economic interest of the society as a whole. This justification for the creation of status offences is strongly espoused by theorists who see the State as an instrument of the dominant economic classes who stand to gain by hard work and industry directly. Summing up the economic analysis of the vagrancy laws William J. Chambliss observes: "... the foregoing analysis of the vagrancy laws demonstrates that these laws were a legislative innovation which reflected the socially perceived necessity of providing an abundance of cheap labour to Englands ruling class of landowners during the period when serfdom was breaking down and when the pool of available labour was depleted. With the eventual break-up of feudalism the need for such laws disappeared and the increased dependence of economy on commerce and trade rendered the former use of the vagrancy statutes irrelevant."⁹

As a Measure of Social Security.—Status offences are motivated also by the consideration of the offenders's interest. It is assumed

8. *Id.*, p. 270.

9. Chambliss, William J. and Mankoff (eds.): *Whose Law, What Order?*, 1976, p. 76.

that persons under certain conditions are not in a position to take the best decision about their interest. For instance, a prostitute, a vagrant, a neglected or victimised child, an ill and infirm beggar needs to be treated, cared after and rehabilitated. Therefore status offences, at least some of them, have been described as an aspect of the welfare State that cares for its weak and handicapped citizens. Radzinowicz described this justification in these words: "The demand was for order, authority and discipline. Beggars, strangers in distress or vagrants should not be relieved in a haphazard way by parish authorities or the individual donors, but should have their claims examined by specialized bodies, perhaps under the authority and sanction of the magistrates."¹⁰

As a Punitive Measure.—In regard to certain class of status offenders the society approved holding out the threat of penal sanction, thereby registering its strong disapproval for the behaviour in question. Chambliss describes this point in his writings in the context of the development of vagrancy laws in England in these words: "The vagrancy laws were subjected to considerable alterations through a shift in focal concern of the statutes. Whereas in their inception the laws focussed on the 'idle' and those 'refusing to labour', after the turn of the sixteenth century the emphasis came to be upon 'rogues' and 'vagabonds' and others who were suspected of being engaged in in criminal activities."¹¹

III. Types of Status Offenders—Vagrants and Beggars

A majority of status offenders such as prostitutes, touts, pimps, hawkers, peddlers etc. are an inseparable adjunct of the modern industrial civilization, and this makes their existence a normal phenomenon in any city today. However, vagrancy and beggary assume special significance on account of their direct link with the production process and their higher visibility. That is why vagrancy and beggary evokes greater concern of the society and the government. Even way back in 1919 the

10. Radzinowicz, Leo, *op. cit.*, p. 42.

11. Chambliss, William J.: "The Law Vagrancy", *Crime and the Legal Process*, 1969, McGraw Hill, N.Y., p. 61.

Provincial Government of Bombay appointed a committee to look into the religious and social basis of the practice of beggary. Such committees were subsequently appointed by the Mysore and Madras Governments also. The central concern of these committees was to generate a new opinion in support of an industrious and hardworking behaviour pattern that will ultimately sustain the capitalist mode of production. It was advocated through these reports that poverty, mendicity, vagrancy and criminality are closely related and are assured stages in the life of misery.

Vagrancy is defined in terms of a person's lifestyle as: "A vagrant has been defined as one who wanders illegally, without a settled habitation, such persons being cognisable by laws. But the exact definition of vagrant, and the class of people included within it, has changed significantly in the course of history."¹² Sir James F. Stephen has described a vagrant in a historical perspective as follows: "In times when serfdom was breaking down and when the statutes of labourers provided what might be regarded as a kind of substitute for it, provisions as to vagrancy were practically punishments for desertion. The labourer's wages were fixed, his place of residence was fixed, he must be taken and sent back. By decrees the order of ideas which this view of the subject represented died away. The vagrant came to be regarded rather as a probable criminal than as runaway slave."¹³ Stephen's such a description of a vagrant is helpful for understanding the motivations underlying the present day social responses to vagrancy and beggary.

Vagrancy and beggary are closely allied activities, that is why the two terms are often used inter-changingly. For example, there is a very little difference in the subject matter and the ambit of the West Bengal Vagrancy Act, 1943 and other earlier State legislations relating to beggary prevention such as the Madras Beggary Prevention Act or the Mysore Prevention of Beggary Act. However, functionally the difference between vag-

12. Radzinowicz, Leo, *op. cit.*, p. 14.

13. Stephen, James F.: *History of the Criminal Law of England*, 1883, Vol. 3, p. 274.

rancy and beggary is that the former does not require any positive act and requires being in a particular condition only, while the latter does involve on element of positive act like "begging" or "seeking alms in a public place". That is why "a beggar is one who asks for alms or charity or performs such actions which derive sympathy from others who give something in return". Thus, the essence of beggary is "to beg" or to cause or procure any other person or a child to do so.

In England and other western societies the vagrants and beggars are classified into three categories as *hoboes*, *tramps* and *bums*. According to St. John Tucker: "A hobo is a migratory worker. A tramp is a migratory non-worker. A bum is a stationary non-worker."¹⁴

Anderson¹⁵ classified the vagrant population as seasonal labourers, migratory casual labourers, migratory non-workers, non-migratory casual labourers and 'bums'. Anderson treated bums as the lowest of all types of homeless men. They included alcoholics, drug addicts, old, helpless and unemployable men, the most pitiable and most repulsive of all, the "down and outs".

In India the phenomenon of vagrancy and beggary assumes variety of forms that have been variously described as types or kinds of vagrancy or beggary. The vagrants and beggars can be classified under the following prominent types :

- (a) Child vagrants or beggars.
- (b) The physically handicapped vagrants or beggars.
- (c) The mentally handicapped or insane vagrants or beggars.
- (d) The diseased vagrants or beggars.
- (e) Casual vagrants or beggars.
- (f) Professional vagrants or beggars.
- (g) Exploiter vagrants or beggars.

14. Tucker, St. John : *World Tomorrow*, 6 (1923), p. 262.

15. Anderson, Nels : *The Hobo*, p. 265.

IV. Causes of Vagrancy or Beggary

Various causes contribute to status offences. The casual question is largely influenced by the perception of the behaviour in question. Vagrancy or beggary can be viewed as a form of personal disorganization or maladjustment on the part of the offender himself. Such a perception leads to locate the casual link in the personality of the offender and concerns with the ways and means of transforming him into a normal person. The other perception views the phenomenon of status offences as an evidence of social disorganisation and relates back to the social roots of the phenomenon. Thus the two major perceptions have led the researchers to focus around prominent causes like physical or mental disability, old age, personality maladjustments, unemployment or underemployment, poverty, calamity and famines, faulty economic relations etc. It would be useful to group the diverse causes of vagrancy and beggary in the following order of priority :

1. Economic causes
2. Religious or Cultural causes
3. Social causes
4. Biological causes

Economic causes

The most important causal head for explaining vagrancy and beggary is the economic condition. Vagrancy and beggary are related to economic condition in two ways. First, beggary might be the consequence of adverse economic condition or distress. Secondly, under certain situations beggary might be motivated by economic gain considerations, this is particularly relevant in cases of organised or exploitative beggary. Causal factors such as unemployment or underemployment, landlessness, poverty, calamity or famines and various other conditions of destitution are all variants of economic causes in the first sense. In the pre-independence era a large section of the Indian population remained perpetually under economic stress mainly on account of unjust land relations and oppressive wage structure. Observing

in this context the preparatory Asiatic Regional Conference of International Labour Organisation (1947) reports.

In the case of India, it is interesting to recall that as far back as 1880 the Famine Commission observed that "the numbers who have no other employment than agriculture are greatly in excess of what is really required for the thorough cultivation of land". This observation was in effect repeated fifty years later by the Royal Commission on Labour in India, which in its report remarked: "Over large parts of India, the number of persons on the land is much greater than the number required to cultivate it and appreciably in excess of the number it can comfortably support. In most areas pressure on the land has been increasing steadily for a long time and a rise in the general standard of living has made this pressure more acutely felt". The growth of rural proletariat, which has been attributed to "the loss of common rights in the rural economy, the disuse of collective enterprise, the subdivision of holdings, the multiplication of rent receivers, free mortgaging and transfer of land, and the decline of cottage industries, is indeed a striking feature of the Indian economy. The landless agricultural labourers numbered 7.5 millions in 1882, 21.5 millions in 1921 and 35 million in 1935; in 1944 they were estimated to number 68 million, or 17 per cent of the total population. Between 1921 and 1931 they increased from 291 to 407 per 1000 cultivating farmers. In Madras, the rural proletariat increased between 1901 and 1931 from 345 to 429 per 1000 cultivating farmers, and in Bengal it increased from 1,805,000 to 3,719,000 or by 50 per cent, during the decade 1921-1931."¹⁶ It is not surprising, therefore, that the rural population migrated in large numbers to urban centres of industry and trade. This exodus became marked in the two decades of famines i.e. 1872-1881 and 1891-1900, when the economic pressure would be in its worst. The migration to urban centres under crisis situations and in the normal times was to the advantage of the emerging capitalist mode of production in the nineteenth and the early twentieth century. According to the Labour Investigation Committee Report (1943) during 1872 and

16. The Conference Report, p. 35.

1943 the working class population in the factories increased from 316,816 to 2,436,312. The following table gives a detailed break-up of the increase:

No. of Factories and Workers Employed (1892-1943)

Year	No. of Factories	Men	Women	Children	Total
1892	656	254336	43592	18888	316816
1912	2710	885822	130025	53796	869643
1923	5985	1113508	221045	74620	1409173
1933	8452	1167284	216817	19891	1403212
1939	10466	1498218	243516	9404	1751137
1943	13209	2158319	265509	12484	2436312

However, the number of people that were sucked into new urban centres were far more than those who could be gainfully employed. Particularly in the post world war period there was employment freeze and mass retrenchment. The jobless and unemployed were left with very limited choice. Going back to the villages which they had left in the hope of better prospects in the towns was not feasible on account of limited employment avenues and increased pressure on land back home. Settled employment in the urban industries could be secured by a relatively small percentage. The only alternative for the large numbers was to hang around in the urban centres and wait for a chance, which invariably meant leading the life of vagrant and surviving through beggary. The post-war 1940s was, therefore, very significant from the point of view of vagrancy and beggary management policy and legislation.¹⁷

17. See for a detailed discussion Pande, B.B.: "Controlling the Working Classes through Penal Measures in British India (1858-1947)", a paper presented at "The History of Law, Labour and Crime" Conference held at the University of Warwick, U.K. (Sept., 1983) (Mimeo).

Economic cause has yet another very significant dimension. The factors like unemployment or underemployment, poverty, destitution etc. are all in a sense secondary causes, the primary cause being the basic economic relations. Seen in this way even some social and biological causes become secondary to the economic condition. Marxists locate the cause of the condition of vagrancy and destitution in the modes of production. According to them there is a close relationship between crime, particularly the status offence type, and the history of capitalism. The transformation from independent, petty commodity production to capitalism entails the taking of land, the criminalizing of the condition of survival for those thrown off the land, and the violation of laws by people who are compelled to indulge in crimes for their livelihood. Karl Marx describes the process that leads to beggary and similar conditions as follows: "The proletariat created by breaking up of the ranks of feudal retainers and by the forcible expropriation of the people from the soil, this 'free' proletariat could not possibly be absorbed by the nascent manufacturers as fast as it was thrown upon the world. On the other hand, these men suddenly dragged from their wanted mode of life, could not as suddenly adapt themselves to the discipline of their new condition. They were turned *en masse* into beggars, robbers, vagabonds."¹⁸

Marx goes on to describe in an elaborate way the process of marginalisation and pauperisation of the working class, who ultimately join the ranks of beggars and criminals. In the words of David Greenberg: "Marx identifies four different forms of relative surplus population. The 'floating' form consists of workers who are hired and fired according to the requirements of business. Employees who lose their jobs when a factory is relocated would be an example. This category grows in number as capitalism expands, but not in proportion to the growth of production where there is an absolute reduction in the numbers of workers employed. Then is the 'latent' form. The transformation of agricultural population into an urban or manufacturing proletariat depends on the existence of a 'latent surplus popula-

18. Marx, Karl: *Das Kapital: A Critique of Political Economy*, 1887 (Ed).

tion' in the countryside—'latent' because it may only move when the alternative employments open up.

The 'stagnant' form consists of very low-paid and irregularly employed workers often in decaying sectors of the economy. Unskilled day labourers are an example. This form is 'self-reproaching and self-perpetuating' in part because of an extraordinary high birth rate, but also because it recruits redundant workers from other sectors of the economy. Lastly, there are the paupers. This form includes those who are unable to work (the elderly, the disabled the sick, the orphan), those who do not adapt to industrial labour discipline and a 'dangerous class' of criminals.¹⁹ Such an elaboration of the marginalized population is immensely helpful in understanding the phenomenon of vagrancy and beggary in the Indian urban context also, which faces, even today, the fact of massive labour migration from rural to urban centres and also the reality of unemployment or under-employment.

Social Causes

Vagrancy and beggary are at another level related to a variety of social factors like the breakdown of joint family, anomie, cultural conflict, community disorganisation, faulty socialization etc. Generally, sociological studies and researches have centered round such casual enquiries and often suggested measures for managing the problem of beggary within the existing socio-economic structure.

Joint family has been a very vital social institution for the management and control of vagrancy and beggary in India. The individual secured substantial support from the family in the event of economic or other forms of social hardship. Members who failed to fend for themselves for any reason, could fall back upon the joint family lap. However, the breakdown of joint family institution on account of large scale migration, weakening of the traditional family structure and the emergence of individualistic considerations seem to have changed the situation

19. Greenberg, David: *Crime and Capitalism*, 1982, p. 62.

considerably. The absence of joint family and other social institutions to share and provide support forces quite a few persons in crisis situations to a life of vagrancy and beggary. The Labour Investigation Committee (1943) highlighted this point in the following words :

The village, the joint family, the caste and several other institutions of old, which were the bulwork of social security for the toiling masses are, unfortunately, steadily crumbling down. At the same time, the urban areas have not yet begun to provide for them that degree of social security which may be considered necessary.²⁰

The anxieties, insecurities and the anonymous mode of urban existence engenders a condition of anomie for the rural migrant, who rarely suffers from any inhibitions and succumbs to the temptations of beggary and vagrancy easily. Furthermore, in some instances vagrancy and allied pattern of existence might be a reflection of cultural conflict. The beggars or vagrants might be acting in consonance with their cultural pattern or they might have considered deviant activity like begging as the best way out under the situation. Often the feudal cultural ways of life come in clash with the urban commoditised way of existence, where even payment space for shelter has to be purchased for a price. The logic of 'strange environment' impairs the rural migrant's sense of difference between obtaining the money through hard work of through beggary.

Social disorganisation is yet another cause of beggary. Social change and industrialization have been responsible for considerable disorganisation in the social institutions and structures. The institutions relating to orphans, infirm and aged, lepers, lunatics, widows and other socially handicapped categories are in a state of disarray on account of lack of resources and uncertainty of policy. This also leads to an increase in the number of vagrants and destitutes.

Religious or Cultural Causes

In India the phenomenon of vagrancy and beggary are

20. The Labour Investigation Committee Report, Government of India, 1934, pp. 8-9.

related to religion and culture. Religious mendicancy is not only tolerated by a large section of Hindu, Muslim and Christian population, but even supported on religious grounds. That is why religious mendicants are often exempted from the operation of the general laws prohibiting beggary.

The phenomenon of religious mendicity amongst Hindus is an adjunct of the *Varnasrama* system of life. Generally a religious mendicant was one who had passed or renounced the householder state of life and had taken up the life of pilgrimage and asceticism. *Varna* system also ordained begging and living on charity for the Brahmin class, who was supposed to be devoted to spiritual learning and avoid wealth and wordly possessions. Similarly, a student in the course of his education in the *Gurukul* was supposed to maintain himself through begging. Thus, begging by a *Vanaprasthi*, *Sanyasi* or a student was in order and considered more as a discipline to oneself than a nuisance to others. Mendicity in these situations was not an occupation, but a form of austerity. However, the religious form of beggary is often misunderstood in the modern times and attempt is made to support professional beggary on religious grounds. Mendicity is treated as a device by fake *sanyasis* and godmen, who find it easy to extort good sums of money from god-fearing and superstitious masses. Religious festivals and congregations prove god-sent opportunities for such operations.

Religious support to mendicity and beggary creates serious social control and management problems. Perhaps to avoid the sensitive religious question the Government of the Province of Bombay thought it proper to appoint a committee way back in 1919. The committee particularly focussed on the issue of religious support to beggary and categorically concluded that: "There is a consensus of opinion amongst religious heads of recognised denomination of Hinduism that although begging is permissible among those who renounce the world, the present mode of going abegging in public streets is unjustifiable."²¹ Similar, enquiry

21. The Report of the Enquiry Committee on Professional Begging in the Bombay Presidency, 1919.

was instituted by the Special Committee for the Prevention of Beggary in Mysore in 1943. The committee came out with a clear finding that Hinduism and Islam permitted begging under exceptional situations, particularly after fulfilling the social obligations of a householder. Both these committees supported the prevailing ruling class ideology: He who would not work, should not eat. However, the post-independence era has witnessed some change in the policy towards religious mendicants. In several States laws grant exemption to religious mendicants, mainly with a view to respecting the religious sentiments of the community.

Biological Causes

Sickness or disease, physical disability or deformity, mental infirmity and old age can be described as biological causes of beggary. The discussion relating to different types of beggars amply shows that a large majority of beggars suffer from some kind of biological disability that makes them less than normal. Dr. Radhakamal Mukherjee identified leprosy as a major cause for beggary in these words: "Leprosy, with its accompanying disablement, disfigurement and social opprobrium is one of the principal causes of beggary in India and is at the same time most difficult to handle."²² Though biological disability may itself be seen as a cause, but actually only those biologically afflicted persons resort to begging who are not in a position to fight out their disability economically. With the limited medical facilities, available either free of cost or at low cost, large percentage of our population is hardly in a position to reach the medical centres. Often they have to carry on with their sickness for a long time, starving and begging till the end.²³

-
22. Mukherjee, R.K.: "Causes of Beggary" in *Our Beggar Problem: How to Tackle it*, J. M. Kumarappa (Ed.) Padma Publications, Bombay (1945), p. 24.
 23. On October 7, 1983, the Supreme Court issued notice to the Delhi Administration and the Superintendent of the Lok Nayak Jayprakash Narayan Hospital pursuant to a petition alleging inhuman conditions in and around the hospital where the poor patients called the '*lawaris mareez*' receive shocking maltreatment. The petition is a strong testimony to the state of the medical services that are available to the vulnerable sections of our society in general.

V. The Legal Framework

The first legal measure against beggary and vagrancy in India was the European Vagrancy Act, 1874, which was primarily meant to deal with the vagrants of European descent. However, under general power of prevention of offences security proceedings could be launched against vagrants, beggars and other categories of status offenders in terms of the provisions of the Code of Criminal Procedure (Act V of 1898).²⁴ The provision directly related to vagrants and beggars was Section 109 which empowered the magistrate to ask "a person with no ostensible means of subsistence, or who cannot give a satisfactory account of himself", to execute a bond, with sureties, for good behaviour up to one year. This provision became the basis for arrest and detention of all "undesirable persons" and vagabonds.²⁵ In addition to this a vagrant or a beggar was subjected to the penal provisions under the local Acts in diverse fields, which related to vagrancy and beggary incidentally, such as the Madras City Police Act, 1833, the Howrah Nuisance Act, 1866, the Calcutta Suburban Police Act, 1866, the Bombay Police Act, 1861, the Punjab Municipalities Act, 1911 (Section 15), the U. P. Municipalities Act, 1916 (Section 248), the C. P. and Berar Municipalities Act, 1922 (Section 206), the Ajmer and Marwar Municipalities Act, 1925 (Section 191) and the Indian Railways Act, 1941.

The appreciation of beggary as a social problem was related crucially with the capitalist mode of production which led the State to evince interest in the regulation and control of beggary and vagrancy through comprehensive formal beggary prevention measures. The handling of this problem acquired distinctly formal and penal character in the 1940s, when the migrant rural working class faced serious destabilization on account of post-war unemployment and economic recession. All the metropolitan

24. Security proceedings under S. 107 (persons likely to commit a breach of the peace or disturb the public tranquillity or doing anything detrimental to the peace and tranquillity may be ordered to execute a bond), S. 109 (vagrants and suspected persons may be ordered to execute bond) and S. 110 (security for good behaviour from habitual offenders), are particularly relevant in this context.

25. S. 109 has been deleted by the Code of Criminal Procedure, 1973.

towns and other industrial centres experienced the menace of large scale vagrancy and beggary, but the problems assumed most acute form in Bengal where the situation was even worse on account of recurring famines. The Bengal Rural Poor and Unemployed Relief Act was passed in 1939, which contemplated the formation of the Union Boards for the administration of Poor Funds for the unemployed and the destitute population. The problem of urban poor led to the passing of the Bengal Vagrancy Act, 1943. In the same lines beggary prevention laws were passed in the States of Madras (1945), Bombay (1945), Mysore (1944), Kerala (1945). The significance of these legislations emerging almost in the same period can be better appreciated by understanding the subtle working class control function performed by these laws.²⁶

The post-independence period beggary prevention laws have followed, by and large, the earlier policy. Though several States have amended and updated their legislations, but none has altered substantially the punitive scheme of the earlier Acts.²⁷ It is significant that growing number of States have enacted similar beggary prevention laws. Fifteen States and two Union Territories have already enacted laws in this field. The common features of these legislations can be summed up as follows :

- (i) They prohibit begging in public places and such conduct entails penal consequences that may vary from release after admonition or personal bond for the first offenders to detention up to ten years in a certified institution or a prison in cases of second or or subsequent conviction.

26. See Pande, B. B. (Sept., 1983, Mimeo) *op. cit.*

27. The Prevention of Begging Bill, 1975, which was meant to serve as the model beggary prevention law for the country, envisaged some provisions for improving the arrest and the post-sentence detention and training processes. However, even this Bill failed to take bold initiatives in respect of the concept of beggary and a non-punitive approach to the problem. See for a detailed comment on the Bill, "Memorandum of Suggestions concerning the Draft (Model) Prevention of Begging Bill, 1975" (A Group of the Teachers of the Faculty of Law, Delhi University, 1977, Mimeo).

- (ii) A distinction is made between an adult beggar and a child beggar. The latter is handled in terms of the Children Act as a 'neglected child'.
- (iii) Habitual beggars or persons using children for the purposes of beggary are considered as serious deviants who are subjected to enhanced penal liability.
- (iv) The beggary offence is established on the basis of a summary trial in the beggars court usually manned by a judicial magistrate or a special magistrate appointed for that purpose.

The Definition of a "Beggar"

The various beggary prevention Acts²⁸ define beggary fairly widely²⁹ and include within its ambit behaviour patterns that involve not only receiving or taking alms but also other preparatory acts that are directed towards that end, like entering on any private premises for the purposes of soliciting or receiving alms [Section 2(i)(c)], or having no visible means of subsistence and wandering about or remaining in a public place [Section 2(i)(d)],³⁰ or allowing oneself to be used as an exhibit for soliciting alms [Section 2(i)(e)] etc. Such a wide ambit of the offence may be justified on the basis of the need to make the law more effective for dealing with the problem, but it does give unduly wide discretion to the police and the raiding party members to interfere with the lives of the innocent citizens. The discretion of the arresting authorities is also widened by clause (a) of Section 2(1) which empowers them to treat "singing", "dancing", "fortune telling", "performing" or "offering any article for sale" as a pretence for soliciting or receiving alms. Large number of people who earn

-
- 28. The present discussion mainly relates to the Bombay Prevention of Begging Act, 1959 that has been extended to Delhi in 1961. (Hereinafter referred to as the Act.)
 - 29. The same wide definition has been incorporated in S. 363-A of the Indian Penal Code after the amendment in 1959 (Act of 1959).
 - 30. The Bill, 1975 had proposed the deletion of this clause on the lines of S. 109 of the Code of Criminal Procedure, 1898, which was deleted by the 1973 Code.

their livelihood by indulging in traditional trades or self-employing vocations are constantly subjected to fear and harrassment only on account of the wide "deeming" power accorded under this provision.

Procedure Relating to the Arrest, Trial and Sentencing of the Beggars

Since beggary prevention laws follow a punitive scheme there are provisions that empower the police or other appropriate officials to arrest persons for the purposes of the enforcement of the beggary prevention measures. The arrested person is to be detained in a pretrial detention or the Reception-cum-Classification Centre and produced before a court for appropriate orders. The beggar offender is entitled to be released on bail pending his trial which ordinarily takes four to six weeks. The trial in the Beggars Court takes the form of a summary enquiry (Section 5 and Rule 6) and follows the procedure prescribed in the Code of Criminal Procedure for the trial of summons cases. Though advocates do appear in some cases, in the bail or trial proceedings, but a large majority of persons picked up for beggary offences lack resources for hiring a lawyer. For the unrepresented lot the summary enquiry and its verdict is totally one-sided and alien. The court has a wide discretion in matters of sentencing. Under several legislations they have powers to vary the sentence between release after due admonition or release on bond to detention in a certified institution up to three years in case of first offenders. The discretion is even wider in cases of second or subsequent offenders, who can be sentenced up to ten years in an institution or prison. Generally a sentence of one year's detention in a certified institution or release on surety bond is preferred in the cases of first offenders.

Detention and Training

The various State beggary prevention Acts envisage a comprehensive administrative machinery for the purposes of pretrial custody, post-trial detention and training of the beggars. The following table gives an idea of the institutions created under the beggary prevention laws in force in the different states :

Receiving Centres and Certified Institutions in India

No. of Institutions for Beggars

State/Union Territory	Receiving centres	Homes for able bodied	Homes for disabled	Homes for diseased	Homes for all categories	Total	Institutional capacity
1	2	3	4	5	6	7	8
Andhra Pradesh	—	1	—	—	—	1	300
Assam	—	—	—	—	1	1	NA
Bihar	—	—	—	—	—	—	—
Gujarat	5	—	—	—	2	7	1250
Haryana	6	2	—	—	—	8	NA
Jammu & Kashmir	2	—	—	—	—	2	100
Karnataka	2	—	—	—	—	2	400
Kerala	3	—	—	—	—	3	250
Madhya Pradesh	—	—	—	—	Not Yet in force		
Maharashtra	4	5	2	3	5	19	4070
Rajasthan	1	3	—	—	—	4	300
Tamil Nadu	19	—	3	—	—	32	3545
Uttar Pradesh	—	4	—	—	—	4	550
West Bengal	1	2	1	2	9	15	3700
Delhi	2	—	—	2	6	10	1810
Goa, Daman & Diu	—	—	—	—	1	1	25
Total	48	17	6	7	24	102	16350

Source : NISD (1980) *A Perspective* (pp. 34-36)

In addition to the abovementioned government-run beggary

institutions there are several private institutions in this field. However, the existing institutional facilities are grossly inadequate for our country's beggar population of approximately 10, 11, 679 male and female beggars of diverse categories (based on the Government of India Census, 1971).

The institutions created in terms of the beggary prevention laws are meant to fulfil twofold objectives, namely, to punish and to treat or rehabilitate. The sentence of detention in the certified institution for a period of one year or more involves substantial deprivation of the liberty of the "beggar", whose freedom and ability to earn is often the only source of livelihood for the dependents. That is why for a large percentage of the pauperised and marginalised population the beggary prevention law's control function is significant. Apart from the punitive function the beggary institutions are also supposed to perform treatment or training function. Section 13 of the Act lays down that the certified institution "may include provision for the teaching of agricultural, industrial and other pursuits, and for general education and medical care of the inmates". The objective of treatment and education is achieved through the services of the supervisory and training staff, probation officers and the doctors. The main aim of these services is to attempt economic, psychological and social rehabilitation of the beggar with a view to helping him to become a normal citizen.

VI. The Administration of Beggar Prevention Laws in Delhi

(i) The Arrest

Any police officer or a superintendent of an institution is authorised to arrest a beggar in terms of the provisions of the Act (Section 4) and Rules framed thereunder (Rules 4 and 5). The arrested person is kept in the nearest Receiving Centre or at the police station pending production before the Beggars Court.

Our experience³¹ of the process of arrest gave an unmistakable

31. Based on the Delhi University Students Legal Services Clinic Beggars Court Legal Services Programme, 1976-1979, documented in Pande, B.B.: "The

ble impression of the arrest power being exercised rather widely. Those arrested were a mixed lot—old and young, infirm and able-bodied, men and women, faithless and those who believed in God. Often the raiding party comprising of policemen and social welfare directorate officials, rounded up members of distinct, self-employed, professional groups such as *sapera* (snake charmers), *kirtania* (religious singers), *kanmelia* (ear cleaners), *jyotishi* (palmist and astrologers), *nat* (acrobat and trapeze performers) and *bazigars* (magicians). The repercussions of such arrests were marked and wideranging. The closely knit group existence of such petty professional was a strong enough reason for all other members of the group to throng the poor house complex in large numbers, to stand by the arrested or his family members in the hour of 'crisis'. Such a gesture would invariably mean loss of that day's earning for these not too well-off class of persons.

We learnt more about the process of arrest in the course of Chottan Choudhary's trial. Chottan Choudhary, a man of frail health, had lost his right arm from just below his elbow in an accident during childhood. His problem was that his natural disability exposed him to a very high degree of risk of arrest. He had been arrested several times earlier also. In the present arrest he was picked up from somewhere in the Sadar Bazar area. On verification it was found that Chottan had a small grocery shop near Inter-State Bus Terminus, thus his presence in the market area, for genuine reasons, was not improbable. In the course of our enquiry we learnt some significant things about the process of arrest from some casual beggars who had been picked up from all over the town in the recent raid. One of them told us how thousands of working men spend nightmarish 'weekends' under the fear of beggary arrest:

We only get a Sunday for washing clothes, giving ourselves a shave and bath, that is why we keep clean for just two or three days in the beginning of the week. Since our work involves sweating and soiling with dust and dirt, that makes the things worst for us. Thus, with the weeks' dust

and dirt in our clothes and bodies the last two days of the week are most dreaded, because once exposed to the gaze of the raiding party we have very little chance of evading arrest.³²

Reporting on the process of arrest, "A Report on Begging in Delhi" observes as follows:

The normal routine of the anti-begging squad is to go out every morning to places like the vicinity of railway stations, the inter-state bus terminus, temples and mosques. The squad usually consists of two men constables, two women constables and two or three of their henchmen who are long term residents of the certified institution. They seize such persons as they think are beggars—not many are caught while actually soliciting alms—and push them into the van and then move on for the next quarry. If the victim asks why he has been seized of, where he is being taken or struggles against being pushed into the van the captors' *lathi* comes down heavily on him.³³

(ii) *The Trial*

Persons picked up for beggary offence are tried in the Beggars Court, which is a specialised court constituted in terms of Section 3 of the Act. The court is housed in the poor house compound at Guru Teg Bahadur Nagar. It is like any other criminal court with all the standard courtroom paraphernalia—high dias, busy clerks buried in piles of paper, formal black dress of the lawyers and the characteristic uneasy silence. The court is presided over by a magistrate, who entertains bail applications, conducts summary enquiry and decides property disposal cases.

Well before the arrival of the magistrate at 10.30 a.m. the alleged beggars are assembled outside the courtroom. The trial starts soon after the magistrate has disposed administrative matters. The alleged beggars are ushered in one by one and presented before the magistrate. The public prosecutor presents

32. Similar complaint of overwide powers of arrest have been highlighted in a recent petition filed before the Madras High Court. Reported in *India Today*, Sept. 30, 1983 issue. A write-up concerning the petition observes "the petition filed by Bathinam and Vasudevan cites alarming cases of innocent poor people being picked up 'like stray dogs in the streets' merely because they looked poorly dressed and in a state of loneliness", p. 140.

33. Rao, Amiya *et al.* (1980): "A Report on Begging in Delhi" (mimeo).

the case on behalf of the prosecution and usually there is none to represent the beggar.

"They were being produced before the magistrate one by one. The courtroom seemed too big and the proceedings too imposing for the dehumanised herd of men and women. Many of them trembled and broke down before their turn. Fortunately the presentation before the magistrate was brief and the proceedings to the point. The magistrate asked questions which invariably proved too much :

"Would you fight the case?"

"No sir, how can I dare to fight?"

(Fighting is considered a bad thing by a majority of these people.)

"Do you have a lawyer?"

"No, I have none."³⁴

Usually the uncontested cases were disposed of in one summary enquiry that lasted less than two minutes. During this brief spell the magistrate examined the charge papers, entertained the prosecuting officer and "heard" the beggar.^{34a} One magistrate relied on a curious method of arriving at the material conclusion by subjecting the hands and feet of the alleged beggar to close physical examination : rough, coarse and blistered hands and cracked feet meant living through hard work and not beggary. The method was simple but effective. It led to a ready presumption which the police found difficult to rebut.

All those who failed to give a satisfactory account concerning employment, their presence in the town and others who looked for turn or recluse were to be beggars.³⁵ The usual pattern of sentence in cases of persons found to be a beggar was either release on condition that he will leave the town, or release on P.B.S.B.

34. Pande, B.B., 1983, *op. cit.*, p. 296.

35. One magistrate relied heavily on the presumption inbuilt in S. 2(1)(d) of the Act and considered the condition of being without means of subsistence and wandering about or remaining in public place as sufficient evidence to arrive at a conclusion about the offence of begging.

for Rs. 1,000 or so. Commitment to the certified institution was the alternative sentence in all the cases of failure to produce the required surety and an exclusive sentence in cases of professional and habitual beggars.

The nature and the policy of the trial seemed to vary with the magistrates. There was one magistrate who created a flutter by insisting on visiting the Detention Centre and the Certified Institution, where the alleged beggars were housed and trained. The magistrate also reminded the probation staff attached to the poor house, in strong words, about their role under the law. He pulled up the arresting agency for not complying with the formalities relating to the date, place, time, alleged behaviour and witnesses etc. in the arrest records. He acquitted many after the first hearing on technical grounds.

“Why was the magistrate transferred when he was doing so well in the Beggars Court? We were told that there were representations against him. He was said to be upsetting the established law and order procedures. The magistrate who took over from him was trained in formal legal ways and was also known for his hard anti-beggar attitude. In his view beggars were like dirty scars that spoil the beautiful image of the nation by parading their misery and went before the foreigners; that is why he advocated stern and deterrent action against them.”³⁶

(iii) *Institutionalized Training and Treatment*

Like the other institutions established under the beggary prevention laws the institutions in Delhi also serve the twofold objectives of punishing and rehabilitating the beggar.

The NISD study (1980) findings about the objective of institutionalization are as follows: “In response to the question, ‘In your opinion what is the main objective of sending a person to the institution’, 42 per cent among the able-bodied beggars replied that the objective was to train them while 46.96 per cent of the diseased beggars responded that the objective was to punish them. Thirty-six per cent of the able-bodied beggars responded

36. Pande, B.B., 1983 *op. cit.*, p. 297.

that the objective of sending persons to the institution was to punish them while 34.84 per cent of the diseased beggars responded that the objective was training.”³⁷

The institutions for ablebodied and diseased beggars provided facilities for the inmates vocational training in trades such as agriculture and gardening, handloom weaving, tailoring and sewing, laundry and drycleaning, bakery etc. In regard to the impact of various vocational trainings on the inmates the opinions have differed. Bhatia (1975) opines that the inmates have received little or no benefit from the institutional training. According to him, the training programmes were not inmate oriented. The NISD study (1980) also reported that “only 42 per cent of the beggar population were imparted vocational training in the institution with a view to rehabilitate them, but recidivism was found high even in this segment. *The attitudes of the inmates towards the institution was not constructive as 42 per cent of the inmates felt that the objective of sending them to the institution was to punish them.* According to the staff only 26 per cent of the inmates had improved very much and 22 per cent improved only slightly.”³⁸

Apart from the limited impact of the training on the inmates, the institutions have also become known for mismanagement and other irregularities. The living conditions in several institutions are far from satisfactory. Not too long ago the fact of large number of inmates escaping from an institution was exposed by the press.

VII. Policy Objectives of Beggary Law Enforcement

Beggary law and administration in India appears to have been inspired by diverse considerations depending upon the historical factor and the exigency of the situation. For instance, in 1940s beggary laws were used against the rural migrant labour, mainly to train and discipline it to the ways of the emerging capitalist mode of production. Once the worker submitted to the modern industrial discipline this consideration receded to the

37. NISD Study (1980), *op. cit.*, p. 53.

38. *Ibid.*

background. The continued presence and the use of the beggary laws even after independence can be explained in terms of the following prominent considerations :

- (a) It provides a framework for the relief of the poor and infirm.
- (b) It is a device for checking "undesirable population".
- (c) It is a measure for the prevention of criminality.
- (d) It is a means for the regulation and control of the labour.

Relief for the poor and the infirm are claimed in the official quarters as the primary consideration for social action in this area. That is why vagrancy and beggary are treated as a social welfare issue and an integral aspect of the State welfarism. However, in view of the paucity of resources allocated to 'relief' head and the limited institutional facilities available one can easily infer that the relief consideration is receiving at best, a low-key treatment. As reported by the official statistics for a national beggar population of well over 10 lakhs the institutional facilities in government-run institutions are only for 16,350 persons. It is interesting to note in the context of relief consideration that there hardly exist any social security services for the destitute and infirm population in our society. Dr. Malcolm S. Adiseshiah's following observation sums up the irony of destitute population admirably : "In India full-time unemployment is almost unknown. It is officially established at less than 1.7 per cent of our work force (compared to the 10 per cent common in France, Britain and U.S.), *because in the absence of unemployment benefit our people cannot afford to be full-time unemployed as then they will simply starve and die.*"³⁹

The over-wide definition of the beggary offence and its application against genuine professional groups as well lend support to the view that this law is a device for excluding large section of the needy population from the job market and also keeping them out

39. Adiseshiah, Malcolm S. : "Dimensions of War on Poverty", *Mainstream*, December 25, 1982, p. 15.

of the cities and other centres of beauty and decency. Otherwise why should the double-track approach recommended by the Study Group on Begging and Vagrancy appointed by the Planning Commission in 1965 have remained largely unimplemented and beggars of all kind receiving the same degrading and wasteful treatment even today.⁴⁰

Administratively, beggary type laws are regarded as essential criminal preventives which confer powers on the police and the administration to arrest, enquire and incarcerate suspicious persons. Thus, a large section of the urban resourceless population is constantly kept under observation and check in the name of peace and order in the society. This consideration is abundantly reflected in the reliance placed on the punitive aspects of the law and administration highlighted earlier.

Finally, as described by William J. Chambliss, "These laws were a legislative innovation which reflected the socially perceived necessity of providing an abundance of cheap labour during a period when serfdom was breaking down and when the pool of available labour was depleted."⁴¹ However, the labour regulating function performed by beggary laws has undergone subtle changes in view of the transformations in the forms of production. It is worthwhile in this context to note the control argument advocated by Francis Fox Pivin and Richard A. Cloward in these terms: "Relief arrangements are ancillary to economic arrangements. Their chief function is to regulate labour, and they do that in two

40. Mark C. Kennedy provides the following explanation for the application of criminal laws against specific target groups: "Criminal laws strangled the ability of lower classes (those alienated from landed feudal ties who had migrated to cities as 'free labour') to possess tools or capital goods, raw material, and also, on pain of heavy penal sanction, forbade association with guild masters themselves. In short, upward mobility became a crime unless guild masters themselves chose to elevate the status of an artisan. Thus penal sanctions guaranteed by the State guaranteed a continuous labour force (whether employed or not) and created two classes of citizens, one bound by criminal laws and penal sanctions and another bound only by non-punitive civil laws. The situation is hardly different today in this respect. Under the formally rational state, second class citizens are never in a position to be governed only by civil laws—they are never in a position to be governed only by civil laws—they are never therefore, beyond incrimination." In *Whose Law, What Order?* 1976, *op. cit.*, p. 46.

41. Chambliss, William J.: *Crime and the Legal Process*, *op. cit.*, p. 61.

ways. First, when mass unemployment leads to outbreak of turmoil, relief programmes are ordinarily initiated or expanded to absorb and control enough of the unemployed to restore order; then as turbulence subsides, the relief system contracts, expelling those who are needed to populate the labour market. Relief also performs a labour regulating function in the shrunken state, however, some of the aged, the disabled, the insane and others who are of no use as workers are left on relief rolls, and their treatment is so degrading and punitive as to instil in the labouring masses a fear of the fate that awaits them should they relax into beggary and pauperism. To demean and punish those who do not work is to exalt by contrast even the meanest labour at the meanest wages."⁴²

Conclusion

Some of the inadequacies of the beggary law and the abuses in its administration can be remedied by reforms such as (1) re-defining the offence more precisely and narrowly so as to exclude all possibilities of abuse at the arrest stage. Traditional professions or trades could be expressly exempted from the ambit of this law; (2) extending legal services facilities in the Beggars Court at State expense⁴³ and introducing the elements of procedural fairness in beggary trials; (3) increasing the existing institutional facilities and imparting meaningful training based on proper classification etc. Beyond these immediate procedural and treatment reforms, however, there is a need to re-examine the whole policy underlying the beggary-type laws. The economic purposes which led to the emergence of these laws during the British times no longer exist today. The technique of providing relief through coercive instrumentality has become thoroughly discredited and is shown to be open to abuses of several kinds. The legal or moral justifications for imprisoning and stigmatizing people because of their poverty or 'strange' ways of survival are becoming increasingly questionable. The society has failed so far in providing jobs to everyone,

42. Pivin, Francis Fox and Cloward, Richard A (1971): *Regulating the Poor: The Function of Public Welfare*, pp. 3-4.

43. See Pande, B.B.. (1980): "Legal Aid to Beggars", *Social Defence*, Vol. XV, No. 60, p. 29.

much less alternatives to self-employed population. Even the most deserving amongst the destitute population go about waging their grim battle for survival lonehanded, without any kind of social security over or aid from the society. In some cases even parents are compelled to sell their children for averting starvation. Therefore, more often than not, the beggary laws only add to the range of miseries that is unfortunately the fate of quite a large section of our population.⁴⁴

44. Approximately 317 million persons are estimated to be living below the poverty line. For this population beggary-type laws mean an additional trap.

RETROSPECTIVE AND PROSPECTIVE REFLECTIONS ON SOCIAL POLICY FOR CHILDREN IN NEED OF CARE AND PROTECTION

VED KUMARI

Introduction

"The nation's children are a supremely important asset"¹ can never be overemphasised. The population of children consists of various categories of children: children between 0-6 years of age group whose primary needs are subsistence, nutrition, health and affection; children of formative years who need, in addition, education and recreational facilities, adolescents who need vocational training in order to look after themselves; neglected and delinquent children apart from a number of other categories which may be based on family, social and geographical factors. In this paper we examine the social policy behind legislation dealing with children in need of care and protection either because they do not have parents or other persons or if they have them, they are unable or unfit to look after them, or they are on the verge of adopting deviant behaviour as in case of child beggars or children found frequenting places of disrepute, etc., or they have entered the life of crimes, i.e., those who have committed an offence, or they have been exploited because of their vulnerability and immaturity.

Changed socio-economic conditions and adoption of welfare functions by the State resulted in the passing of the Apprentices Act, 1850, which provided for binding over as apprentices of juveniles between the age of 10 and 18 years convicted of petty offences or found destitute. By 1920 when the Jail Committee 1919-20 recommended "establishment of separate courts for children with procedure as elastic as possible", various other

* Lecturer, Faculty of Law, University of Jammu.

1. See, "National Policy for Children", Resolution No. 1-14/74-CDD.

provisions recognising the special status of children had been made.² The Madras Children Act, 1920 was the first to follow the recommendations. It started the era of State care and protection to ever increasing number of children through legislation covering more and more parts of the country with the passage of time. The central Children Act (applicable to the Union Territories), was passed in 1960 as a model to be followed by the States. This Act reflects the social policy of the State in relation to its important as well as vulnerable section, namely, the children in need of care and protection. A study of the Children Act, 1960³ (hereafter referred to as the Act) has been undertaken with a view to highlight the difference between policy and its implementation. The Madras Children Act, 1920⁴ has also been taken into account as a reference point to specify the areas of change, if any, in the State policy since 1920.

The Legal Framework

The legal framework has been discussed under three heads for easy comprehension: (a) Types of Children, (b) Care and Protection Infrastructure, and (c) Treatment Programming.

Types of Children

The Act spread its protective wings to delinquent, neglected and uncontrollable children, below the age of sixteen years in case of males and below the age of eighteen years in case of females.⁵ The position had been the same since 1920 except for the age prescribed.⁶ The important change brought about in the policy related to victimisation of children. A separate chapter

2. Ss. 82, 83 of the Indian Penal Code, 1860; the Reformatory Schools Act, 1876 (amended in 1897); Ss. 29(8), 29-B, 309, 399, 562 of the Criminal Procedure Code, 1898.

3. Two sets of rules have been framed under the Act, namely, the Delhi Children Rules, 1961 (hereafter referred to as the Children Rules) and the Delhi Children (Management, Functions and Responsibilities of Special Schools, Children Homes and Observation Homes) Rules, 1964 (hereafter referred to as the Management Rules).

4. Rules under the Madras Children Act, 1940 have been referred to as the Madras Rules.

5. S. 2(e).

6. The age under the Madras Act was sixteen and the nomenclature of the children differed. See Ss. 3(1), (2), (3), 29, 30 of the Madras Act.

is provided for punishments to persons found guilty of offences against children specified there.⁷

Children needed special treatment because of their physical and mental immaturity due to which they were vulnerable to exploitation as well as influence whether good or bad. Therefore, as recommended by the Jail Committee 1919-20, the Madras Act was passed to provide for "the custody, trial and punishment of youthful offenders and for the protection of children and young persons".⁸ With clearer understanding of the concept of child care and protection gained through so many years of experience, the Act laid down the objects extensively in more refined language :

An Act to provide for the care, protection, maintenance, welfare, training, education and rehabilitation of neglected or delinquent children and for the trial of delinquent children....⁸

The substance behind these claims is to be judged by reference to the provisions incorporated in these respects.

(i) *Competent Authority*: The Act introduced an important change by establishing two distinct bodies, namely, the children's court and the child welfare board, to deal with delinquent and neglected children separately.⁹ Previously, though a separate authority for children distinct from that for adults was constituted, no segregation was found necessary among the children from different categories.¹⁰

(ii) *Procedure*: The Jail Committee 1919-20 had realised that a child's experience with the competent authority would have a lasting impact on it. Hence it had recommended that the procedure to be followed by the juvenile court should be as elastic and informal as possible. The Act spelled out this recommendation elaborately.

7. Chapter VII, Ss. 41-44 of the Act.

8. Preamble.

9. Ss. 4-7 of the Act.

10. S. 4 of the Madras Act.

Apart from laying down that the children's court as well as the child welfare board should sit at different places and time, the Act provided that the proceedings should be conducted in as simple a manner as possible. No unnecessary formality should be observed. The competent authority should ensure that the child felt homelike atmosphere. He should not be kept under close guard of a police officer but should stand himself or in company of a relative or a friend or the probation officer as close to it as possible. The competent authority should make full use of its powers to question witnesses to elicit any point in favour of the child. It was specifically laid down under the Act that in examining the child the competent authority was not bound by the Criminal Procedure Code and might address the child in suitable manner to put the child at ease and to exhort the true facts, not only in respect of the offence but also in respect of the home surroundings and the influence to which the child had been subjected.¹¹

The Act ensured that the humanitarian approach would be followed by the competent authority by laying down that the members of the competent authority should have knowledge of child psychology and child welfare.¹²

(iii) *Orders by the Competent Authority:* (a) *In relation to delinquent children.*—The Act provided in relation to delinquent children that the children's court might (1) discharge the child after due admonition and advice; or (2) release him on probation of good conduct under the care of parent, or guardian, or other fit person executing a bond with or without sureties; or (3) in addition to (1) and (2), place the child under the supervision of a probation officer; or (4) send him to an institution; or (5) order him to pay fine if fourteen years old or above and earning. The Act in clear terms laid down that punishment of death, transportation or imprisonment, or committal to prison in default of payment of fine or in default of furnishing security, could not be imposed against a child. At the same time it declared that if the offence

11. S. 27 of the Act r/w Rr. 18-20 of the Children Rules.

12. S. 6(3) of the Act.

committed was of so serious nature or the child was of so depraved a character that it would not be in his interest or in the interest of other children sent to the institution and no other measure was sufficient or suitable, the child might be kept in safe custody and a report of the case might be sent to the government.¹³

(b) *In relation to other children.*—Other children in need of care and protection could be sent to the institution or placed under the care of parent, or guardian, or fit person, or fit institution approved by the government.¹⁴

(iv) *Removal of Disqualifications*: The Act declared that a child, i.e., neglected as well as delinquent, having been dealt with under it would not suffer any disqualification, if any, attaching to a conviction in law for an offence.¹⁵

(v) *Committee of Visitors*: Care and protection to inmates of various institutions under the Act had been ensured by entrusting the management to superintendent and a committee of visitors. The superintendent was required to remain on the premises of the institution and to make provision for smooth running of the institution.¹⁶ The committee of visitors consisted of official and non-official members drawn from court, police, educational inspectors, medical officers, nominees of local authority and residents of the area interested in child welfare.¹⁷

This committee was to meet at least once in a month to see that arrangements were proper in all respect, to hear representations from inmates, to make recommendations in relation to new admissions and their training as well as for general welfare of inmates and progress of the institution.¹⁸

(vi) *Inspection*: The practice of inspection had been employed to keep a constant check on the institutional activities. Extensive

13. *Id.*, S. 22.

14. *Id.*, Ss. 15-16.

15. *Id.*, S. 25.

16. R. 39 of the Children Rules.

17. R. 30 of the Management Rules.

18. *Id.*, R. 32.

provisions had been made for regular inspections of sanitation and health, educational and industrial classes under the Act.¹⁹

Treatment programming involved individualisation, positive and constant contact with society, vocational and educational training, attitudinal change, and after care.

(i) *Individualisation*

(a) *Social investigation*.—The importance of child's background had been given the importance due to it by laying down that for determining order in relation to the child, his character, the conditions in which he is living and the report of the probation officer should be taken into consideration.²⁰ Duties of the probation officers have also been defined which included making of initial enquiries regarding home, school, conduct, character and health, attending the court regularly and submitting reports, keeping case diaries, case files and registers, submitting regular monthly reports of visits to child, his home and school, accompanying children from court to the institution, etc.²¹

(b) *Institutions*.—The Act made provision for segregation of children in separate institutions. It provided for establishment of (1) Observation Homes for the reception and stay of all children pending their cases before the competent authority, (2) Children's Homes for keeping neglected and uncontrollable children when so directed by the Board, and (3) Special Schools for maintenance, education, reformation and rehabilitation of delinquent children when so ordered by the children's court.²² It also provided for establishment of after care organisations to help children after release from institutions to lead an industrious and honest life.²³

The Madras Act had provided for separate institutions, viz. Junior Certified Schools, Senior Certified Schools and Auxiliary

19. Rr. 29, 32-34 of the Children Rules.

20. S. 33 of the Act.

21. R. 27 of the Children Rules.

22. Ss. 9, 10, 11 of the Act.

23. *Id.*, S. 12.

Homes. A child was sent to a particular institution on the basis of its age and not behaviour.²⁴ But this Act had sought segregation of children at the 'undertrial' level by laying down that children or young persons who were under arrest, or remanded, or committed for trial should be detained as far as possible with parent or guardian, otherwise in the custody of respectable persons, or philanthropic societies, or institutions, or village headman, or in reception home wherever it existed. These children could be sent to certified school if the manager of the school agreed and assured segregation of these children from other pupils in the school. It was further specifically provided that such children were not to be detained in jail and if possible separate building for the purpose under the charge of a person other than a police officer should be maintained.²⁵

The Act empowered the administrator to transfer children from one institution to another within the State or outside. The Madras Act, in addition, had laid down the guidelines for such transfer. A child could be transferred from one institution to another only if (a) it was for the welfare of the child, or (b) the child was found exercising evil influence on others, or was guilty of serious breach of a rule, or had escaped from the institution, or (c) the child was above 14 years of age and living in junior certified school while other children were much below his age there, he could be sent to senior certified school, or (d) he was above 16 years living in senior certified school, he could be transferred to a Borstal School for disciplinary or other special reasons.²⁶

(c) *Training*.—Training programme received the importance due to it by the Act. Obligations of the institutions towards inmates had been spelt out elaborately by the Act²⁷ as relating to their accommodation, maintenance, and facilities not only for education but also for all round growth, necessary training for their reformation, facilities for medical examination and treatment and so on. The children should attend regular school and

24. See Ss. 6, 15, 23-24 of the Madras Act.

25. Rr. 5-A, 5-B of the Madras Rules.

26. *Id.*, Rr. 65-66.

27. Ss. 9-11 of the Act r/w Rr. 43, 45, 46 of the Management Rules.

industrial classes but not as to deprive them of reasonable recreation or leisure. They could be exempted from literary classes only after reaching fourth standard. Competent instructors should be employed for each trade taught in the institution.

(ii) *Punishments and Rewards*

Positive and negative sanctions have an important role in reforming the behaviour. The Act provided for rewards as an encouragement to steady work and good behaviour, but had left the aspect of disciplinary actions open to the discretion of the managers.²⁸

A very elaborate system of punishments and reward to pupils of certified schools had been evolved by the Madras Act. It made misconduct punishable by imposition, or deprivation of play hours, or temporary cessation of visits from parents or guardians, or caning on the hand (not more than six), or whipping (not more than twelve).²⁹ Safeguard against arbitrariness was provided by requiring entry in punishment register of particulars of punishment by whom inflicted, nature of offence, name of offender and number of previous punishments awarded to him.³⁰ Good conduct was rewarded by pocket money, more to pupil elected as the monitor of the class, by which they could buy articles like combs, pencils, erasers, soap, toys and sweetmeats, etc., from the school shop. They could also be made members in the school bank and school shop.³¹

(iii) *Contact with outside world*

All children who had been sent to an institution for any length of period had to come back to the community and live there. Therefore it was essential that they remained in positive and constant contact with it. The Act allowed short leave of absence not exceeding 15 days in a year. It also allowed visits from parents or near relations once a month not exceeding one

28. R. 47 of the Children Rules.

29. R. 83 of the Madras Rules.

30. *Id.*, R. 84.

31. *Id.*, Rr. 81, 82, 82-A.

hour, receipt and writing of any number of letters at all reasonable times, though the government was obliged to pay the postage stamp only for one letter a week.³²

These provisions were useful for children who had parents or guardians outside who cared for them. For others, provision for licensing out the child for period and conditions to be mentioned in the licence under supervision of a trustworthy and respectable person had been made.³³ Such persons should be willing to take charge of him with a view to educate and train him for some useful trade or calling.

(iv) *After Care*

All efforts at reforming and training the children might prove useless if no after care programme was evolved. The framers of the Act were satisfied by laying down that rules should be framed for establishment of after care organisations to take care of children after completion of their stay in the children's homes and special schools to enable them to lead an honest, industrious and useful life.³⁴

This aspect had been taken care of in more concrete terms by the Madras Act. It made incumbent on the superintendent to issue a letter to discharged pupil for the Probation Officer, or the Chief Probation Superintendent or the District Magistrate, requesting him to do what he could towards ensuring the pupil a fair start in life as well as reasonable protection against temptations to a relapse into crime. In case of such a requisition to the District Magistrate, the District Magistrate should endeavour to induce the local headman or some respectable neighbour, to do what he could for the pupil and should make use, as far as practicable, of the services of any voluntary association that might be formed to look after the interests of discharged pupils.³⁵ It further required submission of half-yearly reports for three years after discharge of pupil, from District Magistrate, Probation Officer or

32. R. 38 of the Children Rules r/w R. 49 of the Management Rules.

33. S. 48 of the Act.

34. *Id.*, S. 12.

35. R. 105 of the Madras Rules.

Chief Probation Officer with a view to ascertain the career of such pupil. Where no probation officers had been appointed, such reports were to be made by revenue and educational officers. "If the officer charged with the duty of making enquiries ascertained that a pupil...was out of employment, he should not feel content merely to report the fact, but should use every effort to find him employment."³⁶

Conclusion

The above analysis shows that there has been some change in the social policy towards children in need of care and protection since 1920.

Article 39(f) of the Constitution gave the direction to the State to protect children against exploitation. The Act followed the directive and included a complete chapter providing punishment to persons found guilty of offences named therein. But the Act is silent about the infrastructural machinery required for their implementation. To elaborate this point we take one example. Section 44 of the Act provided punishment of fine upto one thousand rupees to an employer who withheld the earnings of the child or used such earnings for his own purpose. One fails to visualise how a case can be even instituted under this section, leaving aside success of prosecution. Suppose A, an orphan child, worked in a small tea-stall as a cleaner for two months during which he was given nothing except two meagre meals in spite of a promised salary in addition to the meals. After two months the employer threw him out blaming him of pilfering, (a tactic used generally to get rid of such hapless children) when he started nagging for money. Section 44 clearly dealt with such situations, but how did it come into operation? The poor child would never know the existence of any such provision. Keeping his age and social milieu in view, it was most unlikely that he would report the matter himself to the police. To believe that the police on its own would be able to locate such instances of exploitation, was to count too much on the efficiency of the police.

36. *Id.*, R. 112.

No intermediaries had been provided with the duty to keep an eye on such children and to protect their interests. The petty employers could exploit their child employees with impunity while the State seemed to be satisfied with a mere symbolic legislation.

Other reformatory changes of some consequence introduced over the years related to emphasis on informality and warmth in the court procedure, removal of disqualifications attaching to any conviction for any offence, more frequent opportunities of contact with the world outside the institution, etc. In the areas of rewards, punishment and after care, the concrete clarity found in the Madras Act had been lost by the Act and its provisions were more general.

The Act reflected the State's policy towards children in need of care and protection which consisted of the following decisions :

- The State was aware and felt responsible for children needing care and protection.
- To this end the State had made special provision by establishing separate system including courts, probation services, institutions, after care organisations for their care and protection.
- The separate courts would be better equipped to understand the children and would have a positive impact on them.
- Probation services would help the children to adhere to the accepted social behaviour by providing them individualised attention in open community.
- The institutions would offer them an environment conducive to their all round growth and development with ample opportunities of maintaining contact with the society as to make them useful citizens.
- The after care organisations would play an important role by helping the children sent to the institution earlier, to adjust in the independent environment of the society.

Reflections

The whole system of justice as provided by the Act operates

below the visibility level. Provisions have been made for punishing a person responsible for publication of material resulting in identification of children involved. It is justifiable on the ground that it offers protection to children against public humiliation. The children in the absence of adverse reaction from the society and the society in the absence of knowledge about their deviation remain receptive to each other. The reports of the children's courts are also not published, it not being a high court. Neither the court proceedings nor the institutions are open to public. Also there is no obligation to publish a yearly report for general perusal. As a result, the society remains unaware and unconcerned and the system operates without any check from the society.

Though comprehensive data and research is not available on the working of the whole system, whatever information is available does not reflect the State's zeal as shown in the Act at the implementation level.

(a) *On Implementation*

The following table reflects on the extent of implementation of the Children Acts in different States.

Table : Enforcement and Establishment of Machinery under the Children Acts³⁷

State/Union Territory	Total No. of Distt.	No. of Distt. covered	No. of Juvenile/Children Court/Child Welfare Board	Observation/Remand Home	Children Home/Fit Person/Fit Inst.	Special School/Certified School/Approved School
1	2*	3*	4*	5**	6*	7**
Andhra Pradesh	23	23	283!	6	—	4
Assam	10	—	—	—	—	—

37. "Statistical Survey", Nos. 64, 67, 68, 69, *Social Defence* (April 1981, Jan. 1982, April 1982, July 1982 respectively).

1	2*	3*	4*	5**	6*	7**
Bihar	31	..	—	13	1	1
Gujarat	19	19	21	22	32	6
Haryana	12	12	—	—	1	1
Himachal Pradesh	12	12	1	—	1	—
J & K	14	1	—	—	1	—
Karnataka	19	19	52	24	21	12
Kerala	12	11	8	9	..	5
Madhya Pradesh	45	45	11	11	5	3
Maharashtra	26	26	34	38	102	40
Manipur	6	6	—	1	1	—
Meghalaya	5	2	—	—	—	—
Nagaland	7	—	—	—	—	—
Orissa	13	—	—	—	—	—
Punjab	12	12	2	8	4	1
Rajasthan	26	5	7	5	2	1
Sikkim	4	..	—	—	—	—
Tamil Nadu	16	16	—	9	—	23
Tripura	3	..	—	—	—	—
U. P.	57	48	31	48	7	8
West Bengal	16	3	1	2	9	8
Andaman & Nicobar Islands	2	—	—	—	—	—
Arunachal Pradesh	9	—	—	—	—	—
Chandigarh	1	—	—	—	—	—
Dadra Nagar Haveli	1	1	—	—	1@	1
Delhi	1	5	1	2	7	8

1	2*	3*	4*	5**	6*	7**
Goa, Daman & Diu	3	3	—	1	1@	—
Lakshadweep	1	—	—	—	—	—
Mizoram	3	—	—	—	—	—
Pondicherry	4	4	1	1	1@	1
Total	413	269	95	200	197	123

** Figures relate to 1977

* As on 15-6-1982

! 282 of these are on part-time basis

.. Not Available

@ Multipurpose Institution

The data about the present investigation workload and supervision work also show overburdened probation officers. In the Union Territory of Delhi total number of presentence investigations and supervision was 503 cases per probation officer during 1976.³⁸

(b) *On Unfortunate Children*³⁹

Ashok was about 15 years old when he came to Observation Home for Boys, Delhi in June 1978, as a 'case property' under Section 368 of the Indian Penal Code, following the orders of the Metropolitan Magistrate and was to remain there "till further orders". He remained within the four walls of the institution for a continuous period of more than two years. In this period, no case work was done on him as his case was not pending either before the children's court or the board. He went out of the institution just once, that too to get water from a well just across the road outside the institution. He helped the gardener during his stay.

38. *Id.*, No. 62 (October 1982).

39. The author came across these cases while conducting her field work, *Rehabilitation Process in Juvenile Correctional Institutions—A Study in Delhi*, Unpublished LL.M. Dissertation, University of Delhi (1981).

After repeated applications and special efforts the district court ordered his release and he was asked to leave. The superintendent compassionately gave Ashok two rupees and a piece of advice, "not to loiter on the roads, otherwise the police would bring him back", and the youth, the so called 'cared for and protected child', was gone into the unknown.

Rajan, 14 years old, in 1980 was an inmate of the Children Home for Boys, Delhi since 1974. He was amongst the brilliant children within the institution as well as in the school which he was regularly attending. His father had abandoned him along with his mother and two sisters. His mother had admitted him and later his sisters to the children homes. (The sisters were living in the Children Home for Girls.) His mother died leaving instructions for the case-worker (probation officer) not to entrust the children ever to the irresponsible father who had previously taken the children out from the institution and then abandoned them at some relatives' place. The brother and sisters pined for each other but the present institutional structure did not permit bringing up of brothers and sisters together. It had separate institutions for each girl and boy not only to "provide him with accommodation, maintenance, and facilities for education but also (to) provide him with facilities for the development of his character and abilities . . . and also (to) perform such other functions as might be prescribed to ensure all round growth and development of his personality".

Manju was 14½ years old when the author met her. She remembered having worked in a circus before she was admitted to the Children Home for Girls at the age of 7 years. She had a faint memory of her mother. The institution sheltered her, fed her, clothed her. She was amongst the more fortunate children as her admission at such young age had enabled her to have continuous education and she was attending regular school. But she lacked the love and affection which made a person feel secure, helped in developing one's character and abilities and all round growth. She was looking toward anybody and everybody for warmth. Few sentences spoken to her in an affectionate tone brought out a long letter full of emotions. This letter showed the child behind, who was lost and lonely, with a deep

longing for belonging, to have someone to whom it could relate itself.

These children were not the only ones in trouble. Each one of them had a sad tale posing a different set of problems, but all demanding for a review of the social policy towards them. The state of implementation, the overburdened probation officers, the lonely children, all point to the social policy of apathy and inertia in relation to children in need of care and protection.

Wasn't somebody needed to help Ashok in finding his way in the free world from which he had remained cut off for more than two years? How and for how long he could avoid crossing the police's way? If children are said good bye at the gate of the institution after long stay with such paltry sum, are we providing them the promised after care?

What type of environment are we providing to our children in the institutions—bringing up children without emotional bonds? Why are we allowing an institutional structure which does not permit brother and sister to live together in a family unit? Can children, starved of love and affection, become 'robust and useful citizens' of tomorrow?

Issues

What is the social policy towards children? That which emerges from a perusal of the provisions of the Act or that which is reflected by the working of the Act? Is legislation alone sufficient care and protection to children to achieve the aim of providing "adequate services to children...through the period of growth, to ensure their full physical, mental and social development"?

A second set of issues which need to be considered relates to why the "nation's supreme asset" is being neglected and what measures need to be taken to ensure implementation of the social policy which reflects through legislation?

AN ANALYSIS OF CHILDREN'S COURT SYSTEM

USHA RAZDAN

The ideal of a juvenile court is best expressed by Judge Julian Mack in the following words :

To find out what the child is physically, mentally, morally and then if it learns that he is treading the path that leads to criminality, to take him in charge, not so much to punish as to reform, not to degrade, but to uplift, not to crush but to develop, not to make him a criminal but a worthy citizen.¹

Progress in our knowledge about the etiology of crime has affected our attitude towards punishment. Societal reaction is changing from punishment to treatment.² This changed attitude is clearly visible in our attitudes towards the child offender as compared to that of adult offender. Treatment in community (probation), special institutional training, after care and parole are important components of this treatment policy.

The penal pharmacopoeia of India in tune with the reformatory strategy currently prevalent in civilized criminology, has to approach the child offender not as a target of harsh punishment but of humane nourishment. This is the central problem of sentencing policy when juveniles are found guilty of delinquency.³

The motivating force which created juvenile courts was the concern for children and not of punishing them for any proscribed behaviour. The same idea may be conveyed by saying that the courts have been visualised as *parens patriae*, to act in place of the

* B.Sc., LL.M., Lecturer, Law Department, University of Jammu.

1. Mack : "The Juvenile Court 23," *Harvard Law Review* (1909).
2. Sutherland, Edwin, E. and Cressey, Donald : *Principles of Criminology*. 6th Edn., (1968) p. 397.
3. *Satto v. State of U. P.*, (1979) 2 SCC 628.

parents in case of their failure to take proper care of the child or (their being absent) to supervise and support him.⁴

The above policy is a result of a realization that a young offender because of his immature socialization and inadequate surrounding is more a need-oriented deterministic deviant than a volitional criminal. The criminal self-conception is not fully evolved and by and large stays at the primary level of delinquency till a definite age. Delinquent children, therefore, need milder and more specific treatment in comparison to adults. Normal criminal courts, due to their own limitations, find it difficult to provide any specific treatment to children. Hence the need for separate courts for child offenders.

History of Juvenile Court

The concept of separate courts, institutions and procedures for juvenile offenders is quite a recent one. It was only when the new penology, based on reformatory and rehabilitative ideas, came to be applied towards the end of the nineteenth century that it was realized that court procedures and prisons meant for adult offenders, could hardly be expected to serve the interests of the juvenile offenders. As a result, therefore, juvenile courts came into existence with their own distinct philosophy incorporating various reforms on the basis of new theories of human behaviour.⁵

Protection of the child and the peace of the community brought the first juvenile court into existence in the year 1899 in Illinois (U.S.A.). Neglected children, dependent children and children who had committed acts which would be regarded as criminal if done by adults were handled by this court. Formal legal procedure was discarded in favour of informality as a means of giving the State a parental relation to the child.⁶ The movement gained momentum. State after State enacted juvenile laws providing for the juvenile courts. By 1945, every State in the United States had passed some type of juvenile court statute.

4. Siddique, Ahmad: *Criminology: Problems and Perspectives*, p. 131.

5. Mohd. Nazmi: 'Juvenile Court Laws in India', *Social Defence*, Vol. XVI, No. 64, April 1981.

6. Ed. Margaret: *Justice for the Child*, Macmillan, New York, 1962.

A similar movement occurred in England for differential treatment of young offenders around the same time. This has been made possible by enactments like the Children Act, 1908; Children and Young Persons Act, 1933; Criminal Justice Act, 1961 and Children and Young Persons Act, 1963 and the Children and Young Persons Act, 1969. A child under 10 years is exempted from liability but he may be the subject of care proceeding under the Act of 1969. The jurisdiction of the juvenile court extends to children and young persons alone. Young offenders are tried in the normal adult court. Under Section 2(1) of the Criminal Justice Act, 1961 it is provided that the court must pass a sentence of Borstal training for offenders between the age of 17 and 21 if the court wishes to give a custodial sentence of 6 months to three years.⁷

Juvenile Courts in India

The wave of reformation that swept over the Western World in the nineteenth century created some ferment in India also. In 1850 the first legislative attempt to deal with children differently from adults was the Apprentices Act, 1850 providing for binding over as apprentices children between the age of 10 to 18 years instead of sending them to prison for minor offences.

This Act was an attempt to keep the petty child offender out of prison to prevent his contamination by the adult offenders. The Apprentices Act, 1850 applied throughout British India. In 1876 the Reformatory School Act was passed which was amended in 1897. This Act was a landmark in the treatment of delinquency in India. Under the Act the State Governments were authorized to establish and maintain reformatory schools, and the courts were empowered to send delinquent boys below 15 years of age to such schools. This Act provided a distinct machinery for dealing with young offenders. But the real impetus for a separate comprehensive legislation to deal with children was given by the following recommendations of the Indian Jail Committee 1919-20.

The creation of a children's court for the hearing of all cases against children and young persons is desirable and

7. Cross, R.: *The English Sentencing System*, 1975, pp. 66-69, 72.

procedure in such courts should be as informal and elastic as possible.

It is often desirable to leave a child offender to his parents, if the home is at all a decent one. The commitment to a prison of children and young persons, whether after conviction or while on remand or undertrial, is contrary to public policy and sentence of imprisonment should, in cases of children and young persons, be made illegal as in England.

Recognising that the child who shows any deviant behaviour should be dealt with in a different manner, Madras (now Tamil Nadu) was the first State to pass the Children Act in 1920. This was followed by Bengal and Bombay in 1922 and 1924 respectively. Five more provinces had Children Acts by the time the country got its independence, and many more States have enacted legislation during the years after independence. The most significant has been the central enactment, the Children Act, 1960 applicable to the Union Territories.

Many States do not have a Children Court

Juvenile Courts though introduced in the early twenties are still few in number in the whole country. Although all the States except the State of Nagaland have enacted Children Acts but Assam, Bihar, Haryana, J & K, Manipur, Meghalaya, Orissa, Sikkim, Tamil Nadu and Tripura have not established even a single juvenile court. The Children Act of 1960 applicable to Union Territories has not yet been enforced in four out of nine Union Territories of Arunachal Pradesh, Chandigarh, Lakshadweep and Mizoram.⁸ The delinquents in these States are dealt with in the ordinary criminal courts—usually by especially empowered magistrates.

Justice Iyer has rightly said that the law, in the past, has lashed the child, not loved it, whatever its pretensions. That is why even now many States have not even a Children Act, and, if there is one, court and counsel, State and citizen, callously interpret it or wittingly ignore it. The truth is that law in India cannot care less for children, the human hope of tomorrow and the current trust in our hands.⁹

8. *Social Defence*, Vol. XIX, No. 74, October 1983.

9. Krishna Iyer, J. on the occasion of the release of the book *Child and the Law* (1979).

In *Hiralal Mallick's* case, the Supreme Court exposed the absence of criminological pediatrics. The court regretted "how shameful it was that in Bihar, the land of the Buddha, the delinquent child is inhospitably treated. Why did the State not pass a Children Act through its elected members? And one blushes to think that a belated Children Act, passed in 1970 during President's Rule, was allowed to lapse. Today, maybe the barbarity of tender age offenders being handcuffed like adult habituals, trooped into the crowded criminal court in hurtful humiliation and escorted by policemen, tied along with adults, attended by court formalities survives in that State; with all our boasts and all our hopes, our nation can never really be decriminalized until the crime of punishment of the young deviants is purged legislatively, administratively and judicially".¹⁰

The Supreme Court of India has also spoken in very strong words that the delinquent child should not be inhospitably treated as it was treated in Bihar. It is relevant to quote the Supreme Court¹¹ in this context.

We hopefully speak for the neglected child and wish that Bihar and, if there are other States placed in a similar dubiety or dilemma, they too, did make haste to legislate Children Act, set up the crucial and other infrastructure and given up retributism in favour of the restorative acts in the jurisdiction of young deviants.

It is important to mention another observation of the Supreme Court during the International Year of the Child (1979) in *Sushil Chaudhary v. State of Bihar*¹²:

It is important to remember that one of the appellants was 15 years at the time of the commission of the offence. It is regrettable that this court has pointed out more than once that there is no Children Act in Bihar and in this international year of the child we have to emphasize that the legislature is expected to do its duty for the children of Bihar by considering the passing of a measure like the Children Act, 1960. Be that as it may, we are unable to deal with the appellant as a child for the simple reason that the absence

10. *Hiralal Mallick v. State of Bihar*, (1977) 4 SCC 49.

11. *Ibid.*

12. (1979) 4 SCC 765, para 3.

of legislation cannot be made up by judicial legislation. All that we can do in the hopeless circumstances of the case and in the helpless situation of the legislative vacuum, is to direct the appellant to be placed either in the open prison or in a model prison in the State where young offenders are kept.

In another case of *Shri Narain Sahu v. State of Bihar*¹³, the Supreme Court again highlighted the utility and approach of reformatory procedure under the Children Act. It observed :

Had there been a Children Act in Bihar State, a compassionate trial would have been statutorily mandatory and the children could not have been marched into regular criminal courts for trial and conviction nor incarcerated with adult criminals with obvious debasement and subtle torture such as homosexual attacks. Unfortunately, despite repeated observations of this court, the conscience of the State of Bihar has not been quickened into kindness towards children. Will the International Year of the Child see the end of this indifference on the part of the legislature and executive?

Again in 1982 the State of Bihar was rapped over the plight of children for not enforcing the Act meant for the welfare of children. After constant persuasion Bihar Children Act, 1982 was passed, which came into force on 30th April, 1982. But unfortunately the lot of innocent children of Bihar has not been ameliorated as no children court has been established as yet. In other States the number of children courts is insignificant keeping in view the large number of juvenile crimes. For example, in the city of Bombay there is only one Juvenile Court to decide about 2500 to 3000 cases per annum. The Supreme Court and High Courts have made adverse comments in a number of cases in this regard.

According to Justice Iyer: 'Governments and Legislatures are so busy with adult agenda of personal relevance that milk for the infant and nutrition for the expectant mother, both below the bread line, must wait till it is too late.'¹⁴

It is, therefore, crucial time that the enactment of the Children Acts and setting up of children courts should not be further

13. (1980) 1 SCC 74.

14. Krishna Iyer, J. on the occasion of the release of the book *Child and the Law* (1979), quoted in 'Popular Jurist', Vol. 1, No. 3, May-June, p. 10.

delayed by the States where it has not been enacted or established so far.

Often the sinner is not the boy or girl but the broken or indigent family and the indifferent and elitist society. The law has a heart—or at least must have.¹⁵ Mr. Justice Fortas, speaking for the U.S. Supreme Court in *Kent v. United States*¹⁶, said :

There may be grounds of concern that the child receives the worst of both worlds, that he gets neither protection accorded to adults nor the solicitous care and regenerative treatment postulated for children.

These critical remarks apply to all the States which have not enacted Children Acts, or enforced them or properly implemented them.

Constitution of Children's Courts

Children's Court is defined under Section 2(B) of the Central Children Act, 1960. It provides :

"Children Court" means a Court constituted under Section 5.¹⁷

Under sub-section (2) there is a provision for the composition of the court which shall consist of any number of first class Metropolitan Magistrates, one of whom shall be designated as the Principal Magistrate.

A new sub-section (3) has been inserted in Section 5 for the first time in the Amending Act, which lays down that every children court shall be assisted by a panel of two honorary social workers possessing requisite qualifications, of whom at least one shall be a woman. The power to prepare a panel of honorary social workers for this purpose has been conferred on the Administrator.

The child needs protection and not punishment. A sympathetic handling of juvenile delinquents prevents their growing into daring criminals. A defect cured in its initial stage prevents

15. *Supra*, note 10.

16. 383 US 541, 556 (1966), quoted in Siddiqui, *op. cit.*, p. 149.

17. S. 5, Children Act, 1960.

further defects and bitter complications; it is better to prevent than to punish crimes. We ought to realise that we should move from punishment of crime to prevention of delinquency. Hence it is right to appoint in the juvenile courts, magistrates with knowledge and experience of psychology and sociology.¹⁸

The task of the Juvenile Court is to understand the child, to diagnose his difficulties, to treat his conditions and to fit him back into the community. This will best be accomplished under the provisions of the Children (Amendment) Act, 1978, which necessitates that every children's court shall be assisted by two honorary social workers, one of whom shall be a woman. A woman with special knowledge of child psychology and child welfare will prove beneficial to the children. Bombay took a wise and good lead in having appointed a learned lady magistrate, a Doctor in Philosophy (specialised in Psychology and Sociology), from the University of Michigan, as the Juvenile Court Magistrate. Such courts work very successfully and should be emulated.¹⁹

Juvenile Court Judge

S. Venugopala has cited Clifford Manshafdt when he says that:

Nowhere else than in the field of Juvenile Court procedure do we need men and women with solid educational foundation which would include a knowledge of economics sociology, social psychology, child psychology and social case work.²⁰

The Juvenile Court being different from ordinary courts the judges are expected to be of different outlook in view of social welfare function which is assumed to be the primary responsibility of the children's courts. No one shall be appointed as a member of the Board or a magistrate in the children courts unless the administrator is of the opinion that he has special knowledge of child psychology and child welfare.²¹

18. M. J. Sethna : *Society and the Criminal*, p. 328.

19. *Ibid.*

20. S. Venugopala Rao : *The Facets of Crime in India*, p. 91.

21. S. 6(3), Children Act, 1960.

Dr. Sethna observes :

The Juvenile Court is not a mere court of law but rather an agency of child welfare; the magistrates at the Juvenile Court should be ladies well versed in child welfare work preferably those skilled in Psychology, Sociology or Social Pathology. There need not be any lawyer magistrate at Juvenile Court.²²

The juvenile judge has a vital function to fulfil in detention. The judge is charged with the solemn determination whether to deprive juveniles of liberty or whether they can be released in their parents custody or to a third party and, if so, what conditions should apply to the release. In making such a decision the judge should follow due process hearing procedures and the legal presumption should favour release. If the decision is to detain, the judge must make a record to support that decision. The legality of preventive detention in the Juvenile Court needs to be tested. If the power is upheld, the procedural safeguards should be as precise as they are for adults. We should abandon the notion that secure detention is good for the child.²³

It was observed in strong words by the Supreme Court in *Munna v. State of U.P.*²⁴, that in States in which Children Acts are in force the magistrates must be extremely careful to see that no person apparently under the age of 16 years is sent to jail but he must be detained in a Children's Home or other suitable place of safety. A nation which is not concerned with the welfare of its children cannot look forward to a bright future.

Jurisdiction

Section 29-B and 399 of the Code of Criminal Procedure, 1898 contained provisions about the jurisdiction of courts and custody of juvenile offenders. The present position regarding the jurisdiction is contained in Section 27.²⁵ Under the Code of

22. *Supra*, note 18, p. 416.

23. *Satto v. State of U. P.*, (per Krishna Iyer, J.).

24. (1982) 1 SCC 545.

25. S. 27 of the Code of Criminal Procedure, 1973 lays down: "Any offence not punishable with death or imprisonment for life committed by any person who at the date when he appears or is brought before the court is under the age of 16 years may be tried by the court of Chief Judicial Magistrate, or by any court especially empowered under the Children's Act, 1960 or any other law for the time being in force providing for the treatment, training and rehabilitation of youthful offenders."

Criminal Procedure it is laid down that if a person under the age of 16 is accused of an offence not punishable with death or imprisonment for life, he shall be tried by the court of Chief Judicial Magistrate, or any court especially empowered under the Children Act, 1960 or any other law for the time being in force providing for the treatment, training and rehabilitation of youthful offenders.

Almost all the Children Acts passed before first April, 1974 contained a specific provision which stayed the operation of Section 29-B of Cr PC to the area where the Children Act was made applicable. The abovesaid provision of the Children Act²⁶ which remained unamended had created a conflict between the law passed by the Parliament, i.e. Code of Criminal Procedure, and the law passed by the States, i.e. Children Acts.

In the case of *Brij Kishore v. State of Haryana*²⁷, it was held by the Punjab and Haryana High Court that the law made by the Parliament is supreme and to that extent the State law (provisions of the Children Act) are void, i.e. the trial of offences punishable with death or life imprisonment cannot be held under the Children Act. Thus the trial of young offender charged under Section 302, Indian Penal Code, under Haryana Children Act, 1974 was held void.

This decision, with due respect, is controversial because Section 5 of the Code of Criminal Procedure, 1973 clearly protects the special procedure or a form of trial and makes the provision of Section 4 of the Code of 1973 inapplicable to that extent. The general philosophy of the special form of procedure under Children Act rejects the punishment of the young offender for any of the criminal offences including those punishable with death and provides for his care, protection, education, training, etc. which lead to his rehabilitation.²⁸

26. S. 65 of the Haryana Children Act, 1974 provides that S. 29-B of the Code of Criminal Procedure, 1898 shall cease to apply anywhere the Children Act has been made applicable. But S. 29-B has not been substituted by S. 27 of new Cr PC so far.

27. *Supra*, note 13.

28. Sirohi, J. P. S.: *Criminology and Criminal Administration*, p. 278.

A further conflict may arise with regard to the grant of bail in favour of a child who is alleged to have committed offence punishable with death or life imprisonment. The power to grant bail is discretionary under Section 437, Cr PC, even though an offender is below 16 years of age, whereas on the contrary, Children Acts²⁹ provide for mandatory release of a youthful offender on bail even if he is charged with an offence punishable with death or life imprisonment. So it may be respectfully submitted that Section 27 has no operation in places where Children Act is in force providing for a special procedure for trial of young offenders.³⁰

The Supreme Court in *Rohtas v. State of Haryana*³¹ overruled the above decision of the High Court in view of Section 5 of the Code of Criminal Procedure and held that the trial of a young offender accused of an offence punishable with death or life imprisonment will be under the provisions of Children Act and not in accordance with the provisions of the Code.

In another case of *Raghubir v. State of Haryana*³², the appellant along with three others was convicted of the offence of murder and sentenced to imprisonment for life by the sessions judge. The appellant was under 16 years of age at the time of commission of offence and was a child as defined under clause (d) of Section 2 of Haryana Children Act. The appeal was dismissed by the High Court. The appellant filed an application for special leave to appeal. Leave was granted confined to the question of the applicability of the Children Act to his case.

The Supreme Court referring to the case of *Rohtas v. State of Haryana* held that the trial of a child under the provisions of the Children Act was not barred. In that case, however, Section 27 of the Code of Criminal Procedure, 1973 was not brought to the notice of the Supreme Court.

29. S. 18(1) of the Central Act and S. 17(3) of Haryana Act.

30. *Supra*, note 28.

31. (1979) 4 SCC 229.

32. (1981) 4 SCC 210.

The Supreme Court observed that the purpose of the Haryana Legislature as well as of the Parliament in enacting the Haryana Children Act and the Central Children Act respectively was to give separate treatment to delinquent children in trial, conviction and punishment for offences including offences punishable with death or imprisonment for life. Section 27 of the Criminal Procedure Code is not a specific provision to the contrary within the meaning of Section 5 of the Code; the intention of the Parliament was not to exclude the trial of delinquent children for offences punishable with death or imprisonment for life, inasmuch as Section 27 does not contain any expression to the effect "notwithstanding anything contained in any Children Act passed by any State Legislature". Parliament certainly was not unaware of the existence of the Haryana Children Act coming into force a month earlier or the Central Children Act coming into force nearly fourteen years earlier. What Section 27 contemplates is that a child under the age of 16 years may be tried by a Chief Judicial Magistrate or any court specially empowered under the Children Act, 1960. It is an enabling provision and has not affected the Haryana Children Act in the trial of delinquent children for offences punishable with death or imprisonment for life.

The majority decision of a full bench of Madhya Pradesh High Court³³ was that the Juvenile Courts constituted under the Madhya Pradesh *Bal Adhiniyam*, 1970 (Act 15 of 1970) have exclusive jurisdiction to try a delinquent child (a person below 16 years of age) for all offences except those punishable with death or imprisonment for life. This decision was relied upon by the State of Haryana. The Supreme Court overruled this majority view and accepted the minority decision of Verma, J., who had held that there was no real conflict between the provisions of the new Code, particularly Section 27 thereof, and the provisions of the *Bal Adhiniyam*. In short, the provisions of the new Code clearly save any special or local law like the *Bal Adhiniyam*, and Section 27 of the new Code is merely an enabling provision which does not express any contrary intention to undo the saving provided in Section 5 of the new Code. There being thus no conflict or repugnancy, the two enactments are capable of

33. *Devi Singh v. State of M. P.*, 1978 Cri LJ 585.

coexistence, the question of Article 254 of the Constitution being attracted does not arise.

As a result of the foregoing reasons the Supreme Court allowed the appeal. It set aside the conviction and sentence imposed upon the appellant and quashed the entire trial of the appellant and directed that the appellant be dealt with in accordance with the provisions of the Haryana Children Act.

Thus a conflict between the law passed by the Parliament, i.e. Code of Criminal Procedure and the law passed by the States i. e. Children Acts is resolved by the above decision of the Supreme Court that the relevant provisions of the two enactments are capable of coexistence, and the question of Article 254³⁴ of the Constitution being attracted does not arise.

If a child is produced under any provisions of the Act before a magistrate not empowered to exercise the powers of a Board or Children's Court under the Children Act, he shall only record his opinion forwarding it along with records of proceedings to the competent authority having jurisdiction over the proceedings; the competent authority shall hold the enquiry as if the child has been brought before it.³⁵

Discriminatory Application of Juvenile Justice

The age limit for purposes of jurisdiction of the juvenile court varies from country to country and even from State to State within a country. In several States in the United States of America, juveniles up to the age of eighteen are triable by the juvenile courts, and in some States the age limit is even twenty-one.

In Gujarat, Bengal and Madras the age limit for both male and female child is 18 years. So a male child below 18 years of age guilty of an offence in Gujarat, West Bengal and Tamil Nadu cannot be imprisoned being a juvenile offender and has to be treated under the provisions of Children Acts of these three States. On the other hand, in the rest of the States the male child

34. Art. 254 of the Constitution.

35. S. 8, Children Act, 1960.

would be treated as an adult offender because the age limit of male child is 16 years, and he cannot be dealt with under the Children Acts of his respective State. Consequently, he may be sentenced to undergo imprisonment. Likewise, a female child offender above 16 years in Punjab and Uttar Pradesh would be treated as an adult offender, while in other States as a child offender. There may be a discrimination within the State itself. For instance, Madras Children Act also applied to Andhra region of Andhra Pradesh and Hyderabad Children Act applies to the Telengana region of the State. The age limit under the Madras Act is 18 years for boys and under Hyderabad Act it is 16 years. This means that a male offender above 16 years and below 18 years in Andhra Pradesh is regarded as a youthful offender whereas his counterpart in Telengana is treated as an adult offender. This also creates difficulties in the transfer of juvenile delinquents from one area to another or from one State to another. Uniform definition of 'child' as provided in Central Children Act, 1960 may, therefore, be suggested.³⁶

Functions of the Children Court

The functions of a juvenile court are to investigate all cases referred to it that come within its jurisdiction and decide upon the best plan for delinquent's immediate future, keeping in view the public interest and delinquent's rehabilitation in the community.

The Central Children Act, 1960 defines a delinquent child as a child who has been found to have committed an offence. It has also been provided that a child means a boy under 16 years of age if a male, and under 18 years of age if a female. The word offence means any act or omission made punishable under any law in force at a given time.

Delinquent children are referred to the juvenile court when arrested by the police for committing an offence punishable under the law of the land. After proper investigation they are charge-sheeted by the police. The case is further sent to the juvenile court for disposal according to the law.

36. *Supra*, note 28, pp. 263-264.

Section 13³⁷ relates to the production of neglected children before Child Welfare Boards. According to Section 13(1), if any police officer or any other person authorized by the Administrator in this behalf, by general or special order, is of opinion that a person is apparently a neglected child, such police officer or other person may take charge of that person for bringing him before a Board.

Section 2(1) of the Central Children Act defines "neglected child" as a child who—

- (i) is found begging ; or
- (ii) is found without having any home or settled place of abode or any ostensible means of subsistence or is found destitute, whether he is an orphan or not ; or
- (iii) has a parent or guardian who is unfit or unable to exercise or does not exercise proper care and control over the child ; or
- (iv) lives in a brothel or with a prostitute or frequently goes to any place used for the purpose of prostitution, or is found to associate with any prostitute or any other person who leads an immoral, drunken or depraved life ;

Thus we see that under the Central Children Act, 1960 there are separate provisions for neglected children and delinquent children. The delinquent children and neglected children are dealt with by Juvenile Courts and Child Welfare Boards respectively. Where a Child Welfare Board or a Children's Court has been constituted for any area, such Board or Court has exclusive jurisdiction under the Act relating to neglected children or delinquent children, as the case may be.

Children's Court Procedure

(i) *Arrest*.—A juvenile delinquent apprehended by the police, and not released on bail, is produced before the court within twenty-four hours of such apprehension. Use of handcuffs in apprehending juveniles is not allowed. The child can be released

37. S. 13, Children Act, 1960.

on bail even for non-bailable offences with or without surety to the charge of his parent or guardian or other fit person who shall produce him on the date fixed or whenever called by the court. The child shall not be so released if there appear reasonable grounds for believing that the release is likely to bring him into association with any reputed criminal or his release should defeat the ends of justice.³⁸

When a child is arrested it is the duty of the officer in charge of the police station to whom the child is brought, to inform the parent or guardian of the child if he can be found, of such arrest and direct him to be present in the children's court/juvenile court before which the child is produced. The probation officer of the area is also informed of such arrest so that he may proceed with his social enquiries in the case and be of assistance to the court.³⁹

But no special provision has been made about the procedure for the production of the child before a juvenile court. There ought to be a special body keeping in view the delicacy of a young mind. Specific guide lines for taking into charge and production of the child should be given.⁴⁰

Probation officers have been contemplated under the Act. But no other machinery has been provided for enquiry and investigation into matters pertaining to the child and thereby the special protection given to the children is lost.

The psychology, economics, family background and environment of a delinquent child should form an integral and essential part of the evidence and trial of the child. The report of the parents, friends, probation officers etc. must form part of the record of the Juvenile Court.⁴¹

(ii) *Inquiry*.—Where a child charged with an offence appears or is produced before a children's court, the Children's Court shall hold the inquiry in accordance with the provisions of Section 39 of the Children Act, 1960.⁴² Section 39 lays down that a

38. S. 18, Children Act, 1960.

39. S. 19, Children Act, 1960.

40. Mittal, Gita : "Child Legislation in India", *Popular Jurist*, Vol. I, No. 3, May-June, p. 25.

41. *Ibid.*

42. S. 20, Children Act, 1960.

competent authority while holding any inquiry under any of the provisions of this Act shall follow the procedure laid down in the Code of Criminal Procedure, 1973 for trials in summons cases.⁴³

Though the courts are required by statute to follow the procedure of the summons case, in principle it is only the essentials which are followed.⁴⁴

(iii) *Orders that may be passed by the Children's Courts.*—There are various alternatives open to the children's court in deciding cases of juveniles.

Where a children's court is satisfied on inquiry that a child has committed an offence, it may allow the child to go home after advice or admonition; direct the child to be released on probation of good conduct and placed under the care of any parent, guardian or other fit person executing a bond with surety for the good behaviour of the child for a period not exceeding three years; make an order directing the child to be sent to a special school; order the child to pay a fine if he is over fourteen years of age and earns money.⁴⁵

In the scheme of the Children Act there is no scope of conviction of a child. There is no scope for sentencing the child. Sending it to the special school is with a view not to impose any term of imprisonment on the child. When the child is in the special school it is not undergoing any such form of imprisonment. When the child is released from the school it does not and it shall not carry any stigma of conviction, for there is none.⁴⁶

43. S. 39, Children Act, 1960.

(1) Save as otherwise expressly provided by this Act, a competent authority while holding any inquiry under any of the provisions of this Act, shall follow such procedure as may be prescribed and subject thereto, shall follow, as far as may be, the procedure laid down in the (Code of Criminal Procedure, 1973) for trials in summons cases.

(2) Save as otherwise expressly provided by or under this Act, the procedure to be followed in hearing appeals or revision proceedings under this Act shall be, as far as practicable, in accordance with the provisions of the [Code of Criminal Procedure, 1973 (Act 2 of 1974)].

44. *Supra*, note 40.

45. S. 21, Children Act, 1960.

46. *Sunil Kumar v. State*, 1983 Cr LJ 99, 101-102 (Ker).

(iv) *Orders that may not be passed against Delinquent Children.*—

A juvenile court cannot pass an order to sentence a delinquent child to death or imprisonment, or commit to prison in default of payment of fine or in default of furnishing security.⁴⁷

In view of Section 22 of Children Act, 1960, it is clear that though the sanction of imprisonment has been removed, yet it has been retained by this section for a child who has attained the age of 14 years in the following circumstances :

- (a) where he has committed a very serious offence ; or
- (b) where his conduct and behaviour has been such that it would not be in his interest or in the interest of other children in a special school to send him to such a school ; and
- (c) where other measures provided are not sufficient or suitable.⁴⁸

Law is what law does and not what law lisps. A law that does not perform is a double hoax. On trial and sentencing, frankly the law of the child is lawless.⁴⁹

Juvenile detention needs a new focus and a new rationale. The detention period ought to be used to begin to draw together resources necessary for constructive change, whether or not the juvenile is adjudicated. There is abundant evidence that detention has failed as an isolated interlude between those more dramatic parts of the juvenile justice system — arrest and trial or disposition.⁵⁰

Some legal absolutes seem imperative; jail for juveniles should be outlawed; status offenders should not be put into secure detention; finite limits should be set on how long a child can be detained before or after adjudication; minimum standards for physical structure, staff and program should be enforced by the courts.⁵¹

47. S. 22, Children Act, 1960.

48. *Supra*, note 28, pp. 286-287.

49. Krishna Iyer, J. on the occasion of the release of the book *Child and the Law* (1979), quoted in '*Popular Jurist*', Vol. I, No. 3, May-June, p. 10.

50. *Ibid.*, p. 9.

51. *Supra*, note 49.

(v) *Constitutional Safeguards*.—The constitutional safeguards available to the adult criminals for his defence by the legal practitioner of his choice are restricted in case of a juvenile delinquent. According to Section 28(3) of the Children's Act, no legal practitioner shall be entitled to appear before a competent authority in any case or proceeding before it, except with the special permission of that authority. However, sub-section (3) of Section 28 of the Act has now been amended. It provides that no legal practitioner shall be entitled to appear before a Board in any case or proceeding before it, except with the special permission of that Board.

The above amendment substitutes the word "Board" for "Competent Authority".

"Competent Authority"⁵² means in relation to neglected children a Board, and in relation to delinquent children a Children's Court, and where no such Board or Children's Court has been constituted, any court empowered to exercise the power conferred on a Board or Children's Court.

From the definition of the "Competent Authority" it is clear that the new amendment of Section 28(3) is silent about the Children's Court and as such legal representative's appearance has been restricted to the cases coming up before the Board (Child Welfare Board) and not in cases coming before the Juvenile Court.⁵³

This change is welcome keeping in view the constitutional and legal protections provided to the adult criminals. Restrictions on the appearance of legal practitioners before the Board is a different issue as the Board has to deal with neglected and uncontrollable children who have not committed any offence punishable under the law.⁵⁴

However, in U.S.A. from where juvenile system emerged, various constitutional controversies have arisen mainly on the grounds that child offenders are denied certain constitutional and legal rights by the Children's Court which are available to adult

52. S. 2(h), Children Act, 1960.

53. *Supra*, 28, p. 280.

54. *Ibid.*, pp. 280-281.

criminals, though sometimes, the orders of the Children's Court are more severe compared to adult courts in similar cases.⁵⁴

The constitutional validity of the Children's Court procedure was first challenged before the U. S. Supreme Court in *Holmes case*⁵⁵, in which the trial court even refused to give a hearing and to decide the constitutional and legal issues which were raised.

The Supreme Court of the U. S. in appeal held that since juvenile courts are not criminal courts, the constitutional rights guaranteed to persons accused of crime are not applicable to the children before them.

The question of deprivation of liberty without following the due process of law as provided in the Fourteenth Amendment of the Constitution was thus not upheld by the Supreme Court in this case.⁵⁶

In *Gault's case*⁵⁷, Gault, a young boy, was given an indeterminate sentence by an Arizona juvenile court. The charge against him was that he was conveying obscene expression to a woman neighbour over the telephone. The Arizona law did not provide for an appeal from the decision of juvenile court. The Arizona appellate court refused to review the findings of the juvenile court. An appeal was, therefore, filed in the U. S. Supreme Court on the grounds that Gault was not given notice of the charges against him nor was he given the right to have a lawyer. Besides, he was also not allowed to cross-examine the witnesses against him and was made to give self-incriminatory answer in the proceedings. The conviction was further challenged on the grounds that a transcript of the proceeding was not given to the accused and the law did not provide for any appeal.

As regards penalty for the offence, it was more severe in the case of juvenile than the adult criminal. In this case, however,

55. *In re Holmes*, (1955).

56. *Supra*, note 28, p. 281.

57. *In re Gault*, 387 US (1967).

Gault was committed as 'juvenile delinquent' by the judge to the State industrial school for the period of his minority (six years) unless sooner discharged by due process of law.

The Supreme Court in *Gault's case* made certain observations regarding juvenile Court justice. After quoting facts and figures regarding juvenile delinquency the court maintained that non-observation of due procedure did not necessarily lead to better situation relating to juvenile delinquents. The absence of constitutional protections does not reduce crime, or that the juvenile system, functioning free of constitutional inhibitions, was not effective to reduce crime or rehabilitate offenders.⁵⁸

The *Gault* decision not only reaffirmed the new trend to enlarge constitutional safeguards in the juvenile court, but it caused a controversy that has not yet abated. A central fear expressed in some quarters is that the juvenile court will become a junior criminal court.⁵⁹

Since *Gault*, the United States Supreme Court has ruled that juveniles may be tried without juries, an affirmation of the informal proceeding, and has ruled that juvenile guilt standards are the same as those for adults, requiring guilt to be established beyond a reasonable doubt and not by preponderance of evidence as had prevailed. This affirms the new trend. The juvenile court is undergoing a facelifting. There will undoubtedly be additional definitive decisions in the future that will more sharply delineate the essentials of the juvenile justice system.

(vi) *Free Legal Aid*.—There is no provision for free legal aid for children under the various Children Acts. It has to be ensured that whenever there is need for legal representation it should not be denied to the child on account of lack of resources on his part. Where he cannot afford it, the assistance of the counsel should be available at the State expense. In England,

58. Ahmad Siddique: *Criminology*, 1977 Edn., p. 136.

59. *Supra*, note 28, p. 282.

60. *Ibid*.

provision for free legal aid exists in Section 33 of the Children and Young Persons Act 1969.⁶¹

Pre-hearing Investigation

While deciding the cases of juvenile delinquents and passing the orders under the Act, the treatment or social rehabilitation of the child is the primary concern of the court. The court, before taking a decision, calls for the report of the probation officer regarding home, family conditions as well as physical and mental condition of the child. These reports are known as preliminary reports. The age of the child and social investigation report have to be taken into account by the court before making the judgment.

As to the importance of pre-sentencing reports the United States Supreme Court stated in *Williams v. New York*⁶², that these

have been given a high value by conscientious judges who want to sentence persons on the best available information rather than on guess-work and inadequate information. To deprive sentencing judges of this kind of information would undermine modern penological procedural policies that have been cautiously adopted throughout the nation after careful consideration and experimentation.

According to Judge F. Ryan Duffy :

If the judge has before him a complete and accurate pre-sentence investigation report which sets forth the conditions, circumstances, background and surrounding of the defendant, and the circumstances underlying the offence which has been committed, the judge can then impose sentence with greater assurance that he has adopted the proper course. He can do so with much greater peace of mind.⁶³

But unless a better deal to the probation officers in terms of their emoluments, training opportunities, transport and other facilities are given, it would be wholly unrealistic to go about

61. Quoted by Jain and Loghani in '*Child and the Law*', Indian Law Institute, 1979, p. 44.

62. (1949) 337 US 242, 249.

63. Quoted by Krishna Iyer, J. in *Satto v. State of U. P.*, (1979) 2 SCC 628

implementing a probation law, however much progressive it might be. Till then probation in India will itself be on probation.⁶⁴

The report of the parents, friends, probation officers etc. must form part of the record of the juvenile court.

Paramount Consideration

The juvenile courts won instant applause for their lofty philosophy and high ideals when they were created for the first time around the beginning of the present century. It is only in the recent past that questions regarding the validity of certain assumptions of the philosophy have been raised and some sort of disenchantment and pessimism has arisen out of the actual working of the juvenile court.⁶⁵

The U.S. President's Commission observed that though the theory regarding juvenile court was that it should be rehabilitative rather than punitive but in fact the distinction often disappeared, not always only because of the limits of knowledge and technique. In theory, the court's action was to affix no stigmatizing label. In fact, a delinquent is generally viewed by employers, schools, the armed services, by society generally as a criminal. In theory, the court is to treat children guilty of criminal acts in non-criminal ways but in fact it labels truants and runaways 'junior criminals'.⁶⁶

To conclude, all States must have Children Acts and children courts. The ordinary criminal courts should not have jurisdiction in children's cases. A child should only be dealt within the congenial and favourable atmosphere of a juvenile court.

There should be a provision for free legal aid for children under the various Children Acts.

Special procedure should be laid down for the production of a child before juvenile courts.

64. Kulkarni, B.S. : 'Juvenile Probation', *Children Aid Society*, 1982.

65. Siddique, Ahmad: *Criminology Problems and Perspectives*, p. 147.

66. President's Commission of Law Enforcement and the Administration of Justice, *Task Force Report: Juvenile Delinquency*, pp. 7-9 (1967).

Separate procedure for investigation of an offence allegedly committed by a child should be provided. The report of the probation officer must form part of the record of the juvenile court.

In juvenile courts we must have magistrates skilled in psychology, sociology and child welfare work. Social pathology should be utilized in dealing with the delinquent child. It is only after a proper diagnosis that the proper remedy could be had.

PROBLEMS AND PERSPECTIVES OF PROBATION IN INDIA

SUBASH C. RAINA

Shift from coercion to correction in the administration of criminal justice has resulted in the creation of new methods and techniques to deal with those who exhibit deviant behaviour in their relationship with other members of the community. Great emphasis is laid on re-socialisation and rehabilitation of offender and prevention and control of crime at an early stage through the process of individualisation of punishment. The ancient methods of deterrence and retribution to control the incidence of crime have been disappointing. Therefore, thrust at present is to abandon the punitive approach and to adopt treatment approach for the rehabilitation of an offender. In order to attain this goal, the personality of the offender, the whole social situation in which he turns to be deviant and the nature of his offence are studied, and, by means of the knowledge thus gained the criminal behaviour of the offender is gauged and controlled. This method is considered to be scientific, and is reflected in 'probation' which is a community based treatment of offenders.

The word 'probation' has several meanings within the Criminal Justice System. It is termed to be a sentencing disposition, correctional sub-system, status and a process.¹ In the words of Prof. Panakal, "Just as modern medicine significantly emphasises the preservation of health and the prevention of disease, probation pointedly insists on the preservation of law abiding behaviour and the prevention of law violational behaviour. Generously favouring rehabilitation over deterrence, probation protects society and simultaneously prevents crime".² It is a

* Lecturer, Faculty of Law, University of Jammu, Jammu.

1. Donald J. Thalheimer: *Cost Analysis of Correctional Standards: Community Supervision, Probation, Restitution & Community Service*, Vol. II, 1978, p. 2.
2. Panakal, J. J.: "Courts and Probation", *Social Defence* (4), Vol. VII, April 1971.

form of criminal sanction imposed by a court upon an offender, just after the verdict of guilty but without the prior imposition of a term of imprisonment.³ It has also been described as a status imposed by the court upon a delinquent who has come before it for disposition and presupposes the suspension of either the imposition or the execution of a sentence and the reference of such a delinquent to the care, supervision, guidance and authority of a representative of the court.⁴

In England the nearest thing to an official definition was provided by Morrison Committee, which observed :

Probation is the submission of an offender while at liberty for a specified period to the supervision of a social case worker who is an officer of the court.⁵

In America, the American Bar Association defines the use of the term probation as a sentence not involving confinement which imposes conditions and retains authority in the sentencing court, to modify the conditions of sentence or to re-sentence the offender if he violates the conditions.⁶

The United Nations Department of Social Affairs—1951 (Probation and Related Measures) has defined probation as a process of treatment prescribed by the court for persons convicted of offences against the law during which the individual or the probationer lives in the community and regulates his own life on conditions imposed by the court or the other constituted authority and is subject to the supervision of a probation officer.⁷

In India, the Statutes under which probation is granted to the juveniles or adults⁸ seem to have accepted it as a sentencing disposition, allowed only to selected offenders who are being

3. *Encyclopaedia of Crime & Justice*, Vol. 3, p. 1240.

4. German, Day, Gallati: *Introduction to Law Enforcement and Criminal Justice*, 8th Ed., pp. 162, 163.

5. McClean and Wood: *Criminal Justice and Treatment of Offenders*, p. 157.

6. *Supra*, note 1, p. 2.

7. Counsel, S.C.: *Probation of Offenders Act & Rules (Central and States)*, 5th Edn., 1980, p. 2.

8. See S. 360 of CrPC, 1973; Probation of Offenders Act, 1958; Children Act, 1960; Suppression of Immoral Traffic in Women & Girls Act, 1956 and other State Children Acts.

placed in the community with conditions and under the supervision of the officer of the court. This view is being supported by the definition put forth by an Indian criminologist that probation is a method of dealing with specially selected offenders and consists of conditional suspension of punishment, while the offender is placed under the supervision and is given individual treatment.⁹

The probation, therefore, is a community based treatment because the offender gets a chance to re-integrate and re-socialise himself into the same social milieu of which he is a part. This chance is being provided to the offenders on selective basis by the court while suspending the sentence and releasing them into the community under the care, supervision and guidance of the probation officer or a case worker. In the words of Carter and Wilkins, "probation is a social as well as a legal process as a method of supervision and guidance in which all available community resources are used and as a process which should aim at the total adjustment of the offender".¹⁰ The advantages of probation are immense and has led a noted American penologist, Sanford Bates, to say :

Probation may be regarded as an investment in humanity ... it encourages rather than embitters. It builds up rather than degrades. It is an investment in community protection.¹¹

The biggest merit is that it does not disrupt the family relations of the offender and the probationer performs his normal and regular vocations and commitments. The importance of this programme has further been emphasised by Justice Iyer in the following words :

The current coin in criminology is neither horror nor terror, neither retribution nor deterrence—concepts which have been demonetised by penological research, prison statistics and psychiatric studies. In their place the more humane, scientific and rewarding method of correction through carefully supervised conditional freedom which inhibits the

9. Shah, J.H. : *Studies in Criminology : Probation Services in India*, p. 1.

10. Carter & Wilkins : *Probation and Parole (Selected Readings)*, 1970, p. 50.

11. Siddiqi, M. Zakaria : "Role of Probation Officer in the Prevention of Crime", *Social Defence*, Vol. IX, No. 36, April 1974, p. 30.

community from recurrent incursions into its peace and safety has been substituted. Faith in man and his essential goodness, a Gandhian creed, leads to the theory that criminality is ordinarily a deviation from normality and therefore a disease which in turn warrants the thesis that the sentencing strategy must be geared to the task of curing the culprit of criminal kink by personalised prescriptions, environmental change and social control. A prison has social significance mainly as a stiff house of mental and moral redemption, a stern hospital for remedying anti-social propensities. But in practice reformation of the young delinquent, the first offender and the victim of criminal company and socio-economic pressure is not only better accompanied by non-institutionalised treatment but jail term is a remedy that aggravates the malady.¹²

What emerges is that it is prohibitive to have a modern prison system for offenders who are sent to jail for offences of petty nature. Even with our modern deterrent system of criminal justice every effort has to be made to bring down the number of offenders who are imprisoned. The figures indicate that in India, out of total prison population, almost 82.5% are short term prisoners with sentences varying from few days to few months, 13% have prison sentence varying between 6 months to 2 years, 3.5% have above 2 years imprisonment as punishment and 1% are cases with life term including death sentence.¹³ These figures indicate that the overcrowding in Indian jails is because of short termers whose sentences are below 6 months and this increasing trend has several implications from the viewpoint of its utility, its efficiency and efficacy. From the correctional point of view the element of correction is absent in a short term sentence. It also affects the rehabilitative programmes in prison. The irrelevancy of correction in short term prison sentences has been described by Cross in the following words:

It is quite impossible that the prisons should be able to exert any reformatory influence in so short a time, nor is the fear of a short sentence likely to have any deterrent effect. It is a startling but incontrovertible fact that for the majority

12. Iyer, V.R. Krishna, J.: "Role of Judiciary in Probation Programme", *Social Defence*, Vol. VII, No. 27, Jan. 1972, p. 25.

13. H. Chander Shaker: "Prison Labour", *Social Defence*, Vol. X, No. 31, Jan. 1975.

of prisoners imprisonment serves no useful purpose either from the angle of deterrence or reformation. It is only an indication that society disapproves of a certain type of behaviour.¹⁴

Keeping in view the corrective value of short term sentences and its destroying effects in the form of social stigma and disruption of family life, except in cases of hardened criminals, the larger population of prison (belonging to soft stuff) must receive punishment which is extra-mural or within the community—here is the relevance of probation as a system with rehabilitative purpose.

Further, the cost involved in maintaining an offender in the institution is very high as compared to the cost involved in rehabilitation of probationers within the community. In U.S.A. it has been analysed that it is 10 to 13 times more to maintain an offender in an institution than to supervise him in the community.¹⁵ In another study it has been pointed out that probation generally costs between \$100 to \$300 per year per offender and institutionalisation from \$1000 to \$3000 per year per offender.¹⁶ The situation in India is almost similar and it has roughly been estimated that cost involved in probation is 1/4th of the total cost involved in prison.¹⁷ Thus in India the Indian Jails Committee, 1919-20 stressed the need for reforming the punitive methods as were prevalent in the Indian criminal laws. The Committee boldly pointed out that the prison administration in India has lagged behind on the side of reformation and observed :

It had failed so far to regard the prisoner as an individual and has conceived of him rather as a unit in the jail administrative machinery. It has a little lost sight of the effect which humanising and civilising influences might have on the mind of the individual prisoner. . . . The whole point of view needs to be altered, not merely in isolated details, but the primary duty of keeping people out of prison needs to be more clearly recognised by all authorities and not least by courts.¹⁸

14. Rupert Cross : *Punishment, Prison and Public*.

15. Vernon, B. Fox : *Introduction to Criminal Justice*, 2nd Edn., p. 363.

16. *Supra*, note 4, p. 163.

17. *Supra*, note 9, p. 63.

18. Report of the Indian Jails Committee (1919) cf. Bhushan : *Prison Administration in India*, 1980, p. 32.

Keeping in mind the importance of probation and its immense utility in India a modest attempt has been made in this paper to highlight the policy goals (legislative development) and the policy implementation of probation programme in India.

(A) Legislative Development

Influenced by the philosophy of utilitarian and reformatory thinkers development took place in the West and legislations regarding probation were enacted both in England and U.S.A.¹⁹ India was not a silent spectator to all this development and the provisions relating to probation are traceable in Section 562 of the Code of Criminal Procedure, 1898.²⁰ Later on, due to the metamorphosis of this provision and the recommendations of the Indian Jails Committee (1919-20)²¹ the Govt. of British India in 1931 attempted to legislate on the subject of probation. However, due to political upheavals, followed by Indian independence movement, the whole idea became dormant. Nevertheless in 1934, provincial governments were authorised to frame respective legislations on probation and certain States framed their probation laws.²²

19. Probation of First Offenders Act, 1887; Probation of Offenders Act, 1907; Criminal Justice Act, 1948 and Criminal Justice Act, 1972 were the Acts passed in England and in U.S.A. in 1878 followed by 1880, 1900 and 1925. Statutes dealing with probation were passed in all States except the State of Mississippi where the statute relating to probation was passed as late as 1956.

20. S. 562 of Criminal Procedure Code of 1898 reads as:

When any person not under twenty-one years of age is convicted of an offence punishable with imprisonment for not more than seven years, or when any person under twenty-one years of age or any woman is convicted of an offence not punishable with death or imprisonment for life, and no previous conviction is provided against the offender, if it appears to the court before which he is convicted regard being had to the age, character or antecedents of the offender, and to the circumstances in which the offence was committed, that it is expedient that the offender should be released on probation of good conduct the court may, instead of sentencing him at once to any punishment, direct that he be released on his entering into a bond, with or without sureties, to appear and receive sentence when called upon during such period not exceeding three years as the court may direct, and in the meantime to keep the peace and be of good behaviour.

21. *Supra*, note 18.

22. Madras Probation of Offenders Act, 1937; U. P. First Offenders Probation Act, 1938; Bombay Probation of Offenders Act, 1938 and C. P. and Berar Probation of Offenders Act, 1936.

After independence, India declared itself to be a social welfare State, therefore, the State was under an obligation to take care of all its subjects and to frame laws on those aspects which a social welfare State is deemed to possess and laws relating to probation being one of them. The seeds of probation of course were undergoing germination and it was not difficult for the State to introduce a central legislation on the subject so as to bring uniformity in its application throughout the country. In order to achieve this a new approach to prisons and related measures was found necessary. Therefore, the technical assistance of U.N. was sought and Dr. W.C. Reckless headed the committee which studied the prison administration in India and reported :

There is good evidence to show that probation supervision as an alternative to jail sentence is the best, most satisfactory and the most economical way of handling the juveniles and adult offenders. In any case more persons should be placed on probation supervision by courts than are sentenced to jails, Borstals and certified schools.

The juveniles should be handled separately from the adult in court. The District Magistrate could depute an interested first class magistrate to hold informal court sessions for juveniles.²³

In view of this a conference took place in Bombay in 1952, attended by all the States which had enacted probation laws. A draft Bill was adopted which resulted in the enactment of the Central Probation of Offenders Act, 1958 (hereinafter referred as P. O. Act, 1958). This Act is a comprehensive legislation dealing with probation. The matter did not rest there. A trend which had developed during the last few decades regarding juveniles (that imprisonment should be an exception and probation a rule) supplemented by the protection which was obligatory on the part of the State to be given to children who constitute 40% of the population in India the legislation dealing separately with juveniles was the inevitable result. All this was not abrupt but the seeds of this are traceable to 1850 when the Apprentices

23. Reckless, W.C.: "A Report on Jail Administration in India", United Nations Publication, 1952.

Act, 1850²⁴ was passed, followed by the Reformatory Schools Act, 1897²⁵ and passing of certain State legislations dealing with juveniles.²⁶ However, a step further after independence was the enactment of Children Act, 1960, for Delhi and other Union Territories which is deemed to be the model Act dealing with juveniles and their peculiar problems. This Act is perhaps a step in the fulfilment of the promise made by the State in Article 39(f) of Part IV of Indian Constitution.²⁷

(B) Policy Implementation

The implementation of probation laws and carrying out of probation programme depends upon the coordinated efforts of the agencies which carry out this programme, namely, the courts, probation officers, after care agencies and the community as such. Probation programme introduced through P. O. Act, 1958 or through Children Acts of the various States or Children Act of 1960 for Union Territories has not been uniformly implemented, or, in other words, State has failed in its duty to implement the policy underlying these social legislations. As is evident from Table No. 1 that State of Jammu & Kashmir, Nagaland and Sikkim and the Union territories of Andaman, Nicobar Islands, Arunachal Pradesh, Dadra and Nagar Haveli have not implemented the P.O. Act. Not only this, in U.P. out of 57 districts only 48 are covered, in Kerala out of 12 only 11 are covered, while in Gujarat out of 19 only 17 are covered. Regarding the Children Act of 1960, which is said to be the model Act and applicable to all Union Territories, it is surprising to note that out of the total nine Union Territories, it has been implemented fully in 3 Union

24. The Act of 1850 provided that the father or guardian could bind the child between the ages of 10 and 18 years up to the age of 21. This Act was dealing with delinquent children; however, as the name suggests, it used to deal with employer employee relationship also.

25. The Act provided that young offenders up to 15 years of age found guilty of offences punishable with imprisonment or transportation were not to be sent to ordinary prisons but to reformatory school.

26. Madras Children Act, 1920; Bengal Children Act, 1922 and Bombay Children Act, 1924.

27. Art. 39(f) reads as follows:

that children are given opportunities and facilities to develop in a healthy manner and in conditions of freedom and dignity and that childhood and youth are protected against exploitation and against moral and material abandonment.

Territories only and in one partially, while in the remaining 5, it has not been implemented so far as is shown in Table II.

Table I

*Showing the States and Union Territories where the
P.O. Act has not been implemented**

S. No.	State/U. T.	Legislation	Total No. of Districts	Districts Covered
1.	Jammu & Kashmir	P. O. Act, 1958	10	—
2.	Nagaland	—do—	3	—
3.	Sikkim	—do—	4	—
4.	Gujarat	—do—	19	17
5.	Uttar Pradesh	—do—	57	48
6.	Kerala	—do—	12	11
7.	<i>Union Territories</i>			
	(a) Andaman Islands	—do—	1	—
	(b) Arunachal Pradesh	—do—	5	—
	(c) Dadra & Nagar Haveli	—do—	1	—

* Source: NISD, Social Defence, Vol. XVI, No. 62, October 1980.

Table II

*Showing the Union Territories where Children Act, 1960
has not been implemented***

S. No.	Name of U.T.	Legislation	Total No. of Districts	Districts Covered
1	2	3	4	
1.	Arunachal Pradesh	Children Act, 1960	Not enforced	
2.	Dadra and Nagar Haveli	—do—	—do—	

** Source: NISD, Social Defence, Vol. XVII, No. 65, July 1981 (Figures relate upto December 1980).

1	2	3	4
3.	Chandigarh	—do—	—do—
4.	Lakshadweep	—do—	—do—
5.	Mizoram	—do—	—do—
6.	Pondicherry	—do—	—do—

Role of Judiciary

The judge is clothed with supreme power of granting or denying probation. A decision for grant of probation is of vital importance to the offender, since it means the difference between restricted freedom within the society and almost complete control within an institution. Therefore, the success of the probation system depends upon the judicious selection of the probationers. The court is under a heavy responsibility to maintain a proper balance between the interests of the offender and the interests of the society (prevention of law violational behaviour and protection of the society). It is in the light of the protection of the interest of the society that certain offences have been made non-probationable. Thus probation is not available to the offender found guilty of an offence punishable with death or life imprisonment.²⁸ Not only where the punishment is death or life imprisonment but the courts are so strict that even in an offence where there is an alternative punishment to life imprisonment (Section 326/149, IPC) and the punishment is of lesser magnitude the courts have interpreted it in such a way that alternative punishment of lesser magnitude cannot be taken out of the category of the offence with life imprisonment.²⁹ Further, any offender found guilty under sub-section (2) of Section 5 of the Prevention of Corruption Act, 1947 which provides for maximum penalty cannot claim the benefit of probation.³⁰ Excluding the Prevention of Corruption Act, 1947, probation is a possibility

28. *S. I. Singh v. Manipur Administration*, 1972 Cr LJ Mani 395; *Rajoo v. State of Rajasthan*, 1977 Cr LJ Raj 837; *P. B. Naresh v. State of Gujarat*, AIR 1970 Guj 186; *Chetti v. State of M.P.*, AIR 1959 MP 291; *Das Bernard v. State*, 1974 Cr LJ Goa 1098; *Som Nath Puri v. State of Rajasthan*, (1972) 1 SCC 630; *Parichhat v. State of M.P.*, (1972) 4 SCC 694.

29. *Jugal Kishore Prashad v. State of Bihar*, (1972) 2 SCC 633.

30. S. 18 of the P. O. Act, 1958.

under other statutes which provide the minimum sentence.³¹ Various High Courts are also of the opinion that fixation of minimum sentence is in no way bar to the grant of the probation.³² It thus seems illogical to exclude the operation of P. O. Act to all cases falling under sub-section (2) of Section 5 of the Prevention of Corruption Act, 1947. The advisability of this statutory bar in such cases was questioned even at the committee stage of P.O. Act.³³ Further, the Acts like Suppression of Immoral Traffic in Women and Girls Act, 1956 and Reformatory Schools Act, 1897 are not covered under the P.O. Act. The grant of probation in socio-economic offences was a highly debatable issue before the Indian courts upto 1976.³⁴ It was in 1976, after the recommendation of the Law Commission in its 47th Report, that the Prevention of Food Adulteration Act, 1954 was amended by adding a new Section 20-AA, which restricted the application of P. O. Act or Section 360 of CrPC, 1973 to offenders involved in socio-economic offences (food adulteration) unless the offender is under 18 years of age. No doubt adulteration of food is an offence of grave nature involving the lives of innocent people and a person involved in such an offence should not be dealt with under the P.O. Act. However, a court should be guided by different considerations while imposing a sentence when the question is that of retailer who sells adulterated goods without knowing about their quality and a manufacturer who knowingly passes the adulterated article. Such matter was taken up by the Bombay High Court in 1977 after the amendment to the Prevention of Food Adulteration Act.³⁵ The seal

31. See R. 126-P of DIR; Indian Railways Act, 1966.

32. *Arvind Mohan Singh v. Prahlad Chandra Samantha*, 1970 Cr LJ 134 Cal; *State v. Rathinavelu*, 1973 Cr LJ 354.

33. Report of the Joint Committee cited in Consul: Probation of Offenders Act & Rules, 1963, p. 150.

34. *Municipal Corporation of Delhi v. Rattan Lal*, 1971 Cr LJ 1485 (Del); *Isher Dass v. State of Punjab*, (1973) 2 SCC 65; *Jai Narain v. Municipal Corporation, Delhi*, (1971) 3 SCC 726; *Ram Prakash v. State of H.P.*, (1972) 4 SCC 46; *M.C.D. v. Anand Sarup*, 1974 Cr LJ 192 (Del); *P. K. Tejani v. M. R. Dange*, (1974) 1 SCC 167; *Arvind Mohan Sinha v. A. K. Biswas*, (1974) 4 SCC 222; 1974 SCC (Cri) 391; *Ghanshyam Das v. Delhi Municipality*, (1975) 4 SCC 821; *K. Visnumoorthee v. State of Mysore*, 1972 Cr LJ 399 (Mys); *New Delhi Municipal Committee v. Raghu Nath*, 1975 Cr LJ 1756 (Del); *Prem Bullab v. State (Delhi Adm.)*, (1977) 1 SCC 173.

35. *Prabhakar Raghunath Kamarker v. State of Maharashtra*, 1977 Cr LJ 127 (Bom).

of the Supreme Court is yet wanted in such cases to settle the dust.

As stated earlier, the keynote of modern penology is the reformation of the delinquent. It is needless to say that conventional punishment inflicts injury and no one is improved by injury. Obviously different measures should be adopted so as to serve the major objective of modern criminal justice system. This can be achieved through judiciary which is the base on which the whole probation programme depends. In the words of Justice Iyer :

The pivotal role of the magistracy in implementing intelligently and compassionately a comprehensive programme of probation involves new learning, new techniques, new responsibilities and new area of decision making... indeed modern criminal jurisprudence and allied social and psychiatric departments have gone so far ahead lagging Indian courts cloistered in their outworn ideas that a national training or refresher programme for the criminal judiciary from the lowest to the highest echelons is an imperative... There is so much of new law to be learnt, so many new crafts to be mastered and reorientation of penal objectives to be acquired, if we are to be judicial activists justice is not cloistered virtue and the robes of the profession do not mark the end of the journey.³⁶

It is the question of administration of law, so implementation of the same also largely depends on the members of the Bar. For the cause of their clients they can request the judge to deal with the delinquents under the provisions of the Act for the purpose of their rehabilitation in the society.

Probation Officer and the Probation

Undoubtedly the responsibility rests on the judge to make a proper selection of offenders to be released on probation. But the said responsibility becomes easier if the report of the probation officer in detail regarding the antecedents of the offender, the social circumstances in which he committed crime and other related facts is laid before the sentencing judge. Thus the work of the probation officer too is very important as he is the person who recommends a case for probation. The work of the probation officer does not stop there but another duty he has is to supervise

36. *Supra*, note 12, p. 26.

the probationer. It is actually the supervision which carries the correctional aspect of probation because the probation officer by supervising helps the probationer to exploit the resources of the community for successful reintegration into the society. But all this can be done only when the probation officer is a trained one and knows his job very well. But P.O. Act, 1958 lays down no specific qualification for the appointment of the probation officer,³⁷ however, certain State rules do provide the minimum qualification for appointment of probation officer.³⁸ Probation officer too is a human being with limitations, he cannot concentrate on the probationers nor can he help them if he is asked to supervise hundreds and at the same time to prepare a social investigation report for others. The success of probation to a greater extent depends upon the case load of the probationers per probation officer. In United States of America in 1950, 303 probation officers supervised 30,087 offenders making an average case load of 100 clients per officer.³⁹ In 1978 there were 328,854 juvenile delinquents on probation consisting of 77% males and the average case load for full time employees in agencies serving only juvenile probation clients was 27, while for adults it was 107 and for agencies offering probation services to both adults and juveniles it was thirty-nine.⁴⁰ In India in 1973 the average case load was 93.9 while in 1974 and 1975 it was 118.3 and 123.0 respectively. In 1976, it has been estimated to be 128.2.⁴¹ This shows an increase in the average case load every year. In other words it means that the number of probation officers remaining static the number of probationers increases. While the number in India relates only to the pre-sentence investigations carried out by probation officer, any additional number of probationers under supervision of the probation officer will flood the above given average.

The voluntary probation services are much in vogue in U.S.A. and the results obtained regarding the carrying out of probation

37. Ss. 13 and 17 of Probation of Offenders Act, 1958. Same provision is applicable to the Children Act, 1960 as regards the appointment of probation officers.

38. S. 9 of Delhi P. O. Rules, 1960 and S. 8 of T. N. Prob. Rules, 1962.

39. Lee, H. Bowker: *Corrections, The Science and the Art*, 1982, p. 323.

40. *Ibid.*

41. NISD, *Social Defence*, Vol. XVI, No. 62 Oct. 1980, pp. 54, 55.

programmes are far from satisfactory. In U.S.A., there are 300,000 to 500,000 volunteers serving probation clients under four models.^{41a} Further, a comparison of high risk probationers participating in the volunteer programme and those placed on regular probation showed that 70% of regular probationers committed an additional offence during the one year period while they were on probation, but that 56 percent of the probationers in the volunteer programme did so.⁴² In India voluntary probation services are almost negligible, we have total 500 probation officers (453 males and 47 females) including 37 honorary probation officers (24 males and 13 females).⁴³

Community Consciousness

The success of probation is also largely linked up with the effective use of community resources. While the individual support given by the probation officer to the probationer relates to his emotional problems, the resources lying in family, school, neighbourhood, employment etc. have a great deal to contribute to offenders' successful reintegration in the society. These resources can be used depending upon the individual need of each case. The use of after-care agencies can also be helpful in exploiting such community resources. As in U.S.A., job bank projects are used.⁴⁴ But the main thing lies in the awareness brought about in the community regarding the probation programme.

Conclusion

The corrective value of probation lies in the supervision done by the probation officer, otherwise probation without supervision could mean nothing but a let-off. In England the First Offenders Act of 1887 contained the provision of probation without supervision but was later on modified and Section 3(i) Criminal Justice Act of 1948 provides supervision as a necessary condition for probation.⁴⁵ In India, however, both the P.O. Act, 1958 under

41a. *Supra*, note 39, p. 330. [Four models are (i) One to One, (ii) Supervision model, (iii) Professional model, (iv) Administrative model].

42. *Supra*, note 39, p. 332.

43. *Supra*, note 41, p. 53.

44. *Supra*, note 39, p. 323.

45. S. 3(i) of the Criminal Justice Act, 1948 is as under :

Where a court by or before which a person who has attained the age of seventeen is convicted of an offence (not being the offence for which

Section 3,⁴⁶ and Children Act of 1960 under Section 21(i)⁴⁷ which empower the court to release an offender after admonition are without any corrective significance.

The Juvenile Court dates long back and the legislation in India also is more than two decades old, but still the qualifications for the magistrate who can deal specially with juveniles and have some corrective attitude have not been laid down. The Amendment of 1977 to the Children Act, 1960 is inadequate as it provides that it is to be helped by two qualified honorary social workers including one woman who possesses corrective attitude.⁴⁸

The qualifications for the probation officer have not been provided in the central legislation, P.O. Act, except the State rules like that of Delhi which provide minimum qualification as graduate in any discipline⁴⁹ and that of Tamil Nadu which give preference to candidates having masters degree in social work.⁵⁰ Not only this, the voluntary probation services do not receive

sentence is fixed by law) is of the opinion that having regard to the circumstances including the nature of the offence and the character of the offender, it is expedient to do so, the court may instead of sentencing him, make a probation order, that is to say, any order requiring him to be under the supervision of probation officer for a period to be specified in the order of not less than one year, and not more than three years.

46. S. 3 of P. O. Act, 1958 reads as follows:

Power of court to release certain offenders after admonition: When any person is found guilty of having committed an offence punishable under Section 379 or Section 380 or Section 381 or Section 404 or Section 420 of the Indian Penal Code (45 of 1860) or any offence punishable with imprisonment for not more than two years or with fine or with both, under the Indian Penal Code, 1860 or any other law, and no previous conviction is proved against him and the court by which the person is found guilty is of opinion that, having regard to the circumstances of the case including the nature of the offence and the character of the offender, it is expedient so to do, then, notwithstanding anything contained in any other law for the time being in force, the court may, instead of sentencing him to any punishment or releasing him on probation of good conduct under Section 4, release him after due admonition.

47. S. 21(i) of the Children Act, 1960 reads as follows:

Where a children's court is satisfied on inquiry that a child has committed an offence, then, notwithstanding anything to the contrary contained in any other law for the time being in force, the children's court may, if it so thinks fit,—(a) allow the child to go home after advice or admonition;

48. See S. 5(2) of the Children Act, 1960.

49. S. 9 of Delhi Probation of Offenders Rules, 1962.

50. S. 8 of T. N. Probation Rules, 1962.

support, so that they can help the probation officers (salaried ones) to carry out probation programme.

Recently we have celebrated 37th Republic Day but the plight is that even the literate section of the society is not aware of probation or other related measures which are community-based treatments for offenders. Any such programme cannot achieve its success unless it receives due publicity within the community so as to make people conscious about the role it can play in reformation and rehabilitation of a deviant person, particularly a juvenile.

SECTION 6
PROTECTION OF LABOUR

PROTECTION OF THE INTERESTS OF THE LABOUR

P. G. KRISHNAN

The thematic thrust of the Seminar is the analysis of the policy component of legislative enactments pertaining to "weaker sections of the society" in which falls the segment of "labour" as a class. Therefore, I have chosen to deal with the topic of "protection of the interest of the labour". As more than 80 per cent of the working class in India is either below poverty line or just above poverty line and since more than 65 per cent of the segment happens to be in the unorganized sector, obviously, "labour" as a class is a weaker section of the society. There is no doubt that the interests of this section needs to be protected if India is to advance on the lines of a socialistic society. "Weaker Section" as contemplated under the Constitution, in the more specific sense, includes, besides labour, the Scheduled Castes and Scheduled Tribes, the women and children. In the context of India and its socio-economic conditions, if wider connotation is to be assigned, it covers large chunks of the population; such as those below the poverty line, the labour force in the unorganised sectors and agriculture, the illiterate segment including women and adults, the old aged who are without support, the number that has taken to begging as a profession to eke out a living, the orphans and so on. The term "weaker section" is thus an ambivalent concept. In the strict constitutional sense, it denotes specific categories of people, such as the Scheduled Castes and Scheduled Tribes, women and children. The object of this paper is to highlight the existing measure of legal protection, available to the organised section generally, under the laws that govern the "labour" as such. It contemplates an overview of the legal provision under different statutes that seek to protect "labour" as one of the weaker sections. "Labour" for the purposes of this paper would refer to persons employed; and

* Professor of Law, Delhi University.

covered by the definitions of the terms "worker" under the Factories Act, and "workman" under the other labour legislation, including "employee" as defined under the social security enactments.

Law, Education and Religion, it is recognised, are the principal agents of social control. Education and Law are the two effective instrumentalities, used by governments all over the world, whatever be the form, for effecting social change, directed or otherwise. While the potentialities of law to bring social change and of education to affect social behaviour is undeniable, the limitations of law as a means of social change is well recognised in all societies even though for the protection of the interests of individuals and groups, the efficacy of law is proved. In using law to protect the interests of labour, as the exigencies demand, every Nation-State has enacted several measures from time to time. In India, law has played a historic role from the late 19th century onwards.

I

To regulate the working conditions and protect the labour employed in factories, the first Factories Act of 1881 was passed. This Act of 1881 applied to factories using mechanical power and employing 100 or more workers. This Act prohibited employment of children under 7 years of age in factories. The next Factories Act of 1891, which made improvements upon the earlier Act of 1881, applied to all factories employing 50 persons and using power for the manufacturing process. It prescribed the age limit of children for employment in factories to be 9 to 14 years. It provided for a weekly holiday and 7 hours a day with 1½ hour interval for women. Slowly and steadily under the influence of the recommendations and ratified conventions of the ILO, the subsequent Factories Acts¹ were enacted, which improved the working hours, health and hygiene, safety and welfare, and provisions of leave and wages of factory workers, until the passing of the Factories Act of 1948. By 1948, few other statutes were also passed which dealt with several matters concerning labour employed in the different industries.

1. Act XII of 1911, Act XXV of 1934, and the several amendments.

The policy component of the Factories Act of 1948 was envisaged by the 9th Standing Labour Committee in the meeting of December 1947.

(1) *Protection under Factories Act*

The Factories Act now provides for a nine-hour day with interval after every 5 hours of work and 48 hours a week. Provision is also there for a weekly holiday and substitution of compensatory holidays for the same, if any worker is deprived of it for any reason. Shift arrangements, prohibition of overlapping shifts, restriction of double employment, and over-time payment are some of the other provisions which safeguard the interest of the factory worker.² The Act also stipulates for the welfare of workers to provide facilities of washing and drying of clothes, rest and lunch rooms, canteen, creches and first aid appliances.³ Further, adequate ventilation, lighting, drinking water, latrine-urinals and spittoons and arrangement for the disposal of wastes and effluents, dust and fumes and the maintenance of appropriate temperature, and proper working conditions and cleanliness in the premises for the health of the workers in the factories⁴ are also mandatory provisions which the occupier of the factory has to see. Adequate and proper safety measures are to be provided in factories where the workers are to work with dangerous machines.⁵ The law imposes penalty on the employer for violation of the provisions of the Act. A factory by definition being a place where 20 or more workers work without use of power; or 10 or more persons work using power, carry on any of the prescribed type of manufacturing processes, the law seeks to provide protection to a large section of workers against the stress and strain they have to undergo.

Apart from the above mentioned provisions, there are special provisions that protect women and children under factories legislation. Women and children are prohibited to be employed near cotton openers and in night shifts.⁶ Children below 15 years

2. See Chapter VI of the Factories Act, 1948.

3. See Chapter V of the Factories Act, 1948.

4. See Chapter III of the Factories Act, 1948.

5. See Chapter IV of the Factories Act, 1948.

6. See Chapters 27 and 66 of the Factories Act, 1948.

of age can be employed only under a Certificate of Fitness from a qualified medical practitioner, appointed by the govt. for this purpose, and are required to be issued and carry a token as employment identification. A child-worker register is to be maintained by the employer and the children employed in factories are to have only a $4\frac{1}{2}$ hours day.⁷ Factories in which more than 500 workers are employed, the occupier/employer of the factory is dutybound to appoint welfare officers. The protective provisions under the Factories Act are mandatory in nature and are intended to protect the welfare of the factory workers. While the labour employed in factories and individual establishments are protected by the Factories Act and Standing Orders Act, 1946; the provision of the Plantation Labour Act, Mines Act and Mines Welfare Labour Legislation, the Dockworkers Regulations and Employment Act provide protection to the labour employed in these respective industries.

(2) Protections of General Nature

The Trade Unions Act, 1926 seek to protect the workers, in their effort to collectively bargain, by enabling unionisation; and a registered union is granted limited immunity from civil and criminal liability. The Industrial Disputes Act, 1947 has recognised disputes between workers and their employer relating to matters of industrial relations, as a special class of dispute, and separate machinery is provided for conflict resolution, on the theoretical assumption that that would facilitate expeditious and inexpensive settlement of the disputes through conciliation or adjudication or even arbitration. Thus a protection is accorded to the labour from litigative proceedings in the court of law; both as a means for settlement and as a measure of relief, for adjudicative settlement is a remedy in itself. The Industrial Employment (Standing Orders) Act, 1946 and Dockworkers (Regulation of Employment) Act, 1948 sought to streamline the employment conditions and set the rules to be adopted to regulate the employment of workers in factories, other industrial establishments, warfs, jettys and dockyards.

Again, the Emigrant Labour Act, Abolition of Contract

7. See Chapter VII of the Factories Act, 1948.

Labour Act, Abolition of Bonded Labour Act, *etc.* have attempted to prevent and contain the abuses in this sector and prohibit contract labour and bonded labour and the system of "begar".

(3) *Protection to Women Labour under Maternity Benefits Act*

The Maternity Benefits Act, 1961 is a piece of legislation which provides certain safeguards to women employees. Prior to the 1961 Act, maternity protection to women workers were afforded under the Act passed by State legislatures. The Mines Maternity Benefit Act, 1941 passed by the Government of India sought to prohibit the employment of women during the advanced stage of pregnancy in mines for work below the ground; and provided the facility of leave with average pay for a limited period, immediately preceding and succeeding the date of delivery for 4 weeks. On the same basic principle the Maternity Benefits Act, 1961 was adopted and it prohibited the employment of women in any establishment for six weeks following the day of her delivery or any miscarriage. A woman worker is entitled to a period of one month's leave on grounds of pregnancy besides the six weeks of confinement leave; during which period she was to be paid by the employer at the rate of average daily wages. The right to such maternity benefit is subject to a qualifying period of 160 days of working in the 12 month period preceding the date of delivery. The maternity benefit is allowed for a maximum of 12 weeks. The Supreme Court has computed the maternity benefits period in a manner that the worker gets nearly 100% wages during the period of absence on account of confinement.⁸

(4) *Protection of Earned Wages of Labour*

The two wage enactments, namely, the Payment of Wages Act, 1936 and the Minimum Wages Act, 1948 guarantee the ordinary workers against unlawful deduction from the contractual wages, and the payment of statutory minimum wages by the employer in the respective industries to which the two enactments apply. Under the Payment of Wages Act the employer is permitted certain lawful deductions such as fines imposed, deduction for absence of duty and damages caused, deduction on account of

8. See *B. Shah v. Labour Court*, (1977) 4 SCC 384.

amenities provided, recovery of loans and contributions made on behalf of the worker etc., at a fixed ceiling level, and at the same time ensured that certain minimum amount out of the total wages for the wage period is duly paid at the appropriate time and without delay. The Minimum Wages Act ensured that each worker in the scheduled industries in which the government has fixed the minimum wages is paid accordingly, and that in each of the scheduled industries there is a minimum wage fixed as payable by the employers, so as to ensure at least a meagre living standard on caloric consumption of food and clothing, based on cost of living index; and that exploitative wage payment is eliminated in these industries.

II

Apart from the above mentioned protections, one substantive area of protective legislation is on the side of social security. The three major enactments in this area are the Workmen's Compensation Act, 1923; the Employees' State Insurance Act, 1948; and the Employees Provident Funds Act, 1952, which includes a Family Pension Scheme, besides the Payment of Gratuity Act, 1972. In these statutes, the Employees' State Insurance and Employees Provident Fund Schemes function, adopting the insurance method of contribution by the employer and employee with financial support from the government for meeting the administrative cost, while the Workmen's Compensation and Gratuity System work under the theory of employer's liability.

(5) *Compensation System*

The Workmen's Compensation System covers the workmen of more than thirty kinds of employments.⁹ A workman who suffers from either "total disablement" or "partial disablement" is entitled to the statutory rate of payment of compensation, except under circumstances when the workman has been guilty of wilful disregard of safety devices or disobedience of the express rules made for purposes of safety of the workmen or has been under intoxication by drinks or drugs, on account of which the accident and the resultant injury occurred and is disabled. The entitlement

9. See Schedule II of Workmen's Compensation Act, 1923.

of compensation is only when the accident arises "out of and in the course of employment". Since the liability of the employer to pay and the right of the employee to claim accrues on the abovementioned circumstances, the judicial opinion has tended to be liberal in granting compensation, taking the view that the phrase 'personal injury' caused to a workman by accident arising out of and in the course of employment, occurring in Section 3 of the W.C. Act, is a legal imposition of strict liability on the employer to pay, irrespective of fault, under the nature and circumstances of the accident. In several decisions, the judiciary has taken the position that if at the time of the accident, the employee is engaged in any work which is ordinarily connected with the trade or business activity of employer, irrespective of other factors compensation is payable, for the reason that the loss of earning capacity of the "workman" causes suffering and deprivation not only to the workmen alone, but to the whole family and dependants, and that is socially undesirable. The courts have usually granted the statutory compensation making effective the protection granted by the Act.¹⁰

(6) *E.S.I. System*

The ESI Act of 1948 integrates several benefit schemes, rolled into one, and is implemented and administered territorially extending to nearly 400 centres, both States and Union Territories inclusive. It covers slightly over 65 lakhs 89 thousand 500 family units, spread to nearly 2 crore 55 lakhs 67 thousand 300 beneficiaries.¹¹ Despite this impressive figure comparing it with the strength of either the working population or the total population, the measures are not very significant, since it serves only a negligible fraction of the Indian people as social security. The ESI system provides accident benefit and maternity benefit. The accident benefit is both disablement benefit and dependants' benefit. The accident benefit payable is identical with that under the Workmen's Compensation System. There is also the provision of a legal presumption that an accident which arises in the course of insured persons' employment will be deemed to have arisen out of that employment, so much so that the defence of the

10. This is so in India and in England, more particularly recent decisions.

11. Annual Report of the ESI Corpn., 1977-78.

employer, and the necessity of proving the nexus between the accidental injury and the nature of employments, is obviated.¹² However, an insured person is disentitled to take accident benefits under the Act, if he is claiming compensation or damages under any other law or under the Workmen's Compensation Act. Those who suffer from occupational diseases also are entitled to claim the accidental benefit, in the same manner as disablement and dependants' benefits as in the case of "employment injury" arising out of and in the course of employment.¹³

Under the ESI Act, medical benefit for a period of 8 weeks and benefit for a period of 12 weeks is available. There is also provision for funeral benefits to be paid to the person who actually incurs the expenses, in case of the death of an insured person, subject to a maximum of Rs. 100. The medical benefits now extend to the family of the injured person also. The right to claim these benefits are subject to the qualifying condition of contribution to the ESI Fund. As for instance, for sickness benefit the employee must have paid 13 weeks contribution in the corresponding contribution period.¹⁴ Under the ESI system, as stated earlier, the maternity benefit is claimable for a total period of 12 weeks, 6 weeks pre-natal and 6 weeks post-natal, subject to the condition of 13 weeks contribution payment in the corresponding contribution period. It is payable at double the rate of "standard benefit" calculated on the basis of average daily wages, as given in the first schedule. The daily rate of disablement and dependants' benefit is at 25% more than the "standard benefit" rate, payable in relation to the relevant contribution period, at full rate for temporary disablement and permanent total disablement. For permanent partial disablement, the rate of benefit is related to the percentage of loss of earning capacity, depending on the nature of the injury. An injured person is debarred from similar benefits admissible under other enactments if he is claiming under the ESI Act.

12. See S. 51-A.

13. See Ss. 51-A, 53 and 61.

14. There is a great misuse of medical benefit encashed. Cash benefits paid on account of "ill-health" is for more than the expenditure on actual medical case.

The ESI Act thus protects the insured workman and provides for certain contingencies and risk coverage as an integrated system.

(7) *The Employees' Provident Fund and Gratuity System*

The Employees' Provident Funds Act, 1952 and the Payment of Gratuity Act of 1972, effectuate measures of compulsory contribution and payment. The EPF Act protects the interest of employees and provides financial security as a service benefit on retirement or superannuation. Prior to the EPF Act of 1952, there were provident fund schemes instituted in private industries. Provident fund benefits were available to government servants under the different State enactments. The Employees' Provident Funds Act, 1952 extends to a number of industries listed in Schedule I which covers factories and other manufacturing industries, mills, textile and oil industries; industries in the public sector and to the non-factory industries listed in the Appendix to Schedule I, such as plantation, mines, laundry, canteens etc. The benefits accrue to any employee, including those employed through the contractor, in the particular establishment, and who is a subscribing member to the provident fund scheme. The rate of benefit is related to the contribution on the part of the employee (which is usually $8\frac{1}{3}\%$) of the wages received with an equal amount contributed by the employer, thus facilitating a lump sum amount for the employee who superannuates or retires. The Employees' Provident Funds Act also provides for a meagre amount of family pension which is linked with a deposit insurance scheme. The amount to which the employee is entitled under the scheme is unattachable and is a prior charge on the assets of the establishments and is payable in preference to other debts.¹⁵ The family pension scheme benefit is available to the family of those employees who have opted for it and make contribution for the same. The entire scheme of provident fund and family pension is a contributory system, based on the wages of the employee concerned. In the government employment sector, in place of contributory provident fund system there is life-pension scheme as the retiral benefit.

15. See Ss. 10 and 11 of the Employees' Provident Funds Act.

Yet another statutory protection is the payment of gratuity or retirement benefit. The Payment of Gratuity Act, 1972 introduced a system of compulsory payment to employees covered by the definition of Factory, Mine, Oilfield, Plantation, Port, and Railway Company, as defined in the respective Acts concerning these establishments.¹⁶ Gratuity benefit is payable to all employees who either voluntarily resign or retire or superannuate. An employee who is terminated by dismissal or discharge for misconduct including moral turpitude is disentitled, and will forfeit the gratuity. The employee can claim the payment of gratuity fulfilling the eligibility condition of five years continuous service, and he will be entitled to 15 days wages for every completed year of service as gratuity amount.

The Employees Provident Fund and gratuity being merely retiral benefits accruable for uninterrupted and efficient service, and also being a lump sum payment at the end of the career; though it is a protection in the sense that a certain amount of financial security guaranteed when the employee is not in a position to earn, it cannot be considered as an effective protection as that of life-pension.

Such are the protections to labour in India.

III

It is evident from the above that it is over a period of years, and that too in a fragmentary manner, that whatever protection statutorily provided for labour has come about. And the foregoing discussions lead to the conclusion that a segment of the employed persons in India has statutory protection for certain contingencies and for some financial security as retirement benefit. These statutory protections had been a matter of sporadic legislative activity undertaken to guarantee the organised sections of the working population alone. It has been the resultant of the recommendations of several commissions appointed for the purpose.

16. Factory as defined in the Factories Act, 1948; Mine as defined in the Mines Act, 1952; Oilfield as defined under the Oilfields (Regulation and Development) Act, 1951; Plantation as defined under the Plantation Labour Act, 1951; Port as defined under the Indian Ports Act, and Railways as defined under the Indian Railways Act, 1890.

Whether it is the private entrepreneur or a public corporation or the government, the liability is on the employer to see that the protections statutorily provided are in real sense guaranteed.

Surprisingly, no consistent effort is made to provide total protection or a comprehensive social security, even to a sizeable segment of the working population in India. For labour in the unorganised sector, rural agricultural and casual labour domestic servants, odd jobbers and other categories of manual and technical labour and the self-employed, have been left uncovered by any measure of social security or economic protection. They are left to vagaries of chance and vicissitudes of life, whether it is accident, sickness, maternity or old age, there is a lack of social thinking. No doubt, there is an awareness that the weaker sections of the society (but only those who are denominationally the weaker sections under the constitutional provisions) needs the legal protection for economic survival and social living—social policy formulations and governmental effort and legislative action have taken care hitherto of only that chunk of society which is accepted constitutionally as the weaker section. And the social policy components of every legislative action have been only limited and palliative.

The statutes dealt with above viewed from the objects and reasons have largely subverted the purpose and the social objective. Nevertheless, the weaknesses in the operation of the two major enactments, the Provident Fund Act and the Employees' State Insurance Act and the weaknesses of the law, have left much that is desirable. The social attitudes (particularly of the employer) have not been conducive and constructive to provide the necessary economic and social protection to even those sections which were covered by the legislation. The heavy arrears on the part of employees in the contributions have led to the frustration of the social policy content of the statutes. Further, the coverage given by these enactments is only to a small fraction of the total population, that it renders even the meagre protection still more insignificant.

In the light of the above, the following propositions emerge for discussion:

“The Labour” taken as an important segment :

1. Are the protective measures sufficient and adequate, in their content and coverage, to ensure a quality of life, even to those to whom the law gives protection, if not, what should be the next step?
2. In what manner and by amending which legislation can we ensure substantial protection and improve the standard of life of the labour?
3. Is it not desirable to have a comprehensive and integrated system of social security, to cover all those who are below the poverty line—the yardstick being per capita income on the line of the National Insurance System of England or the old age, survivors disability and health insurance system of U.S.A.?
4. Is it not necessary, and timely, to consider the framing of an industrial code, which contains the minimum standards of health, welfare and safety and regulation of working hours and other working conditions, with adequate provision of social security and wage scales?
5. Is it not that adequate protection and labour contentment in itself is an input for accelerated growth and development?

ACCIDENTS IN INDUSTRIAL UNDERTAK-
INGS—AN EXAMINATION OF CAUSES
OF WORK-RELATED ACCIDENTS :
A Socio-Legal Study of the Adminis-
tration of Workmen's Compensa-
tion Law in the States of
J & K and Punjab

K. L. BHATIA

While Article 38 of the Constitution of India enjoins the State to secure the health and strength of workers, Article 42 directs the State to make provision (through the instrumentality of law) for securing just and humane conditions of work, and Article 43 also directs the State to endeavour to secure, by suitable legislation or in any other way, to all industrial workers conditions of work ensuring a decent standard of life and full enjoyment of leisure. The State strives from time to time to achieve these social goals through the instrumentality of law in order to ameliorate the hapless conditions of workers and promoting healthy as well as conducive industrial life.

In almost all industrially advanced societies legal provisions exist for reducing the incidence of industrial accidents and occupational diseases. Duties are imposed upon industrial units to comply with the legal provisions relating to safety at work such as the minimum physical facilities in respect of building, ventilation, cleanliness, layout of the plant and machinery and also welfare measures pertaining to hours of work, facilities for taking lunch, etc. In order to ensure that the industrial establishments

* B.A. (Hons.), LL.M., Ph.D. (Poona), Reader in Law, Faculty of Law, University of Jammu, Jammu 180 001.

comply with these legal requirements special administrative machinery is created for periodical inspection of the factories. The importance of these provisions to minimise the risks of accidents cannot be overemphasised. Many accidents could be prevented if the industrial units strictly comply with these provisions. An industrial accident is a misfortune not only to the worker and those dependent upon him; it has also social consequences inasmuch as the costs of human wear and tear and rehabilitation of the victims of accidents have ultimately to be borne by the members of the society. In highly developed and affluent industrial nations there is, so to say, a literal compliance with the provisions of the law; nevertheless, there too accidents occur and wage earning workers suffer disabilities of various kinds.

By any standards, India is one of the industrialised nations of the modern times. Consequently, the legislature has responded to the need of the time by the enactment of the Factories Act, 1948 which lays down minimum standards of safety at work and welfare of the workers. It also contains provisions regarding an administrative mechanism for overseeing compliance of the legal requirements prescribed under this Act.

Some of the important obligations imposed on the employers of the industrial units under the Factories Act are worthy of mention. Although there are no specific norms in respect of layout, the law requires that the factory be designed in a manner as to allot about 500 cubic feet per worker.¹ Floors, steps, stairs, passages, gangways and means of access have to be maintained² and the industrial unit has to be kept free from effluvia arising from any drain, privy or other nuisance.³ Effective steps have

-
1. S. 16 of the Factories Act, 1948. For factories set up before the commencement of this Act the minimum space per worker comes to about 350 cubic feet. No allowance is to be made for space above the height of 14 feet from the floor. It may also be pointed out that the present author is not examining the provisions of the Factories Act, 1948 relating to health, safety, welfare, etc. of the workers. They form an independent avenue for pointed research... empirical and non-empirical. The main factors correlated with our area of study are (a) physical facilities in terms of layout of building, lighting and ventilation; and (b) layout of machinery.
 2. *Ibid.*, Ss. 32 and 33.
 3. *Ibid.*, S. 11.

also to be taken by the owner of the factory to prevent inhalation of dust or fume which is injurious to the body and health of the worker.⁴ Furthermore, suitable measures have to be adopted by the employers for securing in every workroom adequate 'ventilation' as well as 'temperature'.⁵ There is also a statutory obligation in respect of suitable 'lighting' of all those areas of the factory which are frequented by the workers in the workrooms.⁶ The management is responsible to make effective arrangements for drinking water and provide facilities in respect of latrines, urinals and spittoons.⁷

Since many accidents arise due to operation of machines in the factories, obligations have been imposed on employers with regard to upkeep and use of machinery. The duty to fence machine is absolute.⁸ All machines must be properly maintained and kept in good repair. Work on or near a machine in motion such as examination, adjustment, lubrication and oiling of the machine, etc. must be conducted exclusively by an adult worker specially trained for the purpose. This task could not be assigned to women or young children. Young children are prohibited to work at any dangerous machine unless they have been fully instructed to observe precautions as to the dangers arising in connection with the machinery. There are numerous provisions with regard to the proper layout of the machinery such as suitable devices for cutting of power from running machinery driven by power, good and sound mechanical construction of hoists and lifts, use of sound material construction of every lifting machine, etc. The purpose of proper layout of machinery in an industrial plant is to ensure the safety of workers, and to prevent, as far as possible, the risk of industrial accident.

4. Factories Act, 1948, S. 14.

5. *Ibid.*, S. 13. One of the recognised methods for bringing down temperature is humidification, and this process is extensively used in cotton textile factories in India. Wherever it is used the employer of an industrial undertaking is required to install and maintain hygrometers and thermometers for recording the humidity and temperature of the workroom. The State Governments are empowered to prescribe standards for humidification and regulate methods of artificially increasing the humidity. See also Morris S. Viteles: *Industrial Psychology*, 1962, pp. 492-497.

6. *Ibid.*, S. 17.

7. *Ibid.*, Ss. 18, 19 and 20.

8. *Ibid.*, Ss. 21 to 41.

In order to gain insights into the actual measures taken by various industrial establishments data has been collected heuristically from the area of our study, that is, the States of Jammu and Kashmir and Punjab, keeping in view the undermentioned hypothesis :

Incidence of industrial accidents vary with the facilities in terms of space, lighting arrangements, ventilation, etc. in the plant.

For the purpose of this study a sample of 200 workers and 70 members of the supervisory staff has been taken.⁹ A structured questionnaire was administered on these respondents with a view to seeking information on some important matters relating to safety at work and welfare of workers. Some information was also scanned from the labour departments of the two States. Observational study of the various industrial units visited also forms part of the discussion.

1. Causes of Accidents and Occupational Diseases : Findings on Primary Source Data :

In order to know empirically the state of safety in industrial undertakings the responses of workers on the causes of accidents and occupational diseases were obtained. Before the data of the field study is introduced it may be mentioned that no labour department mentions statistics under the Workmen's Compensation Act, 1923 relating to causes of accidents. Consequently, it was necessary to determine it on the basis of the responses of workers. To ensure credibility of the responses collected, only the victims of accident, namely, the workers, were chosen as respondents. The findings are a valuable preliminary to understanding the causes of industrial accidents. While collecting the information as to the causes of accidents and occupational diseases it was impressed upon the respondent-workers that industrial accidents could be classified either as 'machinery accidents', that is, those resulting from inadequate safeguards of machine in industry or 'non-machinery accidents', that is, those resulting from causes other than insufficient machine protection. The latter class of

9. For identification of this sample and detailed explanation, see in particular, Bhatia, K.L. : *Administration of Workmen's Compensation Law : A Socio-Legal Study*, 1986, Deep and Deep Publications, New Delhi.

accidents primarily occur either as a result of factors such as tender age of the worker, his inexperience, carelessness, fatigue, or lack of proper facilities in the industrial units such as poor ventilation, insufficient lighting but not including accidents which cause death or disablement of a worker through a machine for any reason whatsoever. The respondent-workers were expressly told to record their responses accordingly which have been presented in Table 1.

Table 1

Showing the distribution of sample of workers giving the causes of the accidents and occupational diseases in their industrial units.

S. No.	Response (Cause of accident)	Frequency	Percentage
1.	Machinery accidents	124	62%
2.	Non-machine accidents such as occupational diseases (T.B., Asthma, Cancer, etc., contracting due to different Yarn, etc., dust, lack of ventilation)	28	14%
3.	No Accident	48	24%
4.	Total	200	100%

Out of 200 workers interviewed for the present study 124 (62%) had met with accidents, 28 (14%) contracted diseases peculiar to their job; while 48 (24%) had neither met with any accident nor contracted any disease due to the peculiarities of their job. Interestingly, most of the workers of this latter category have been on their jobs for less than five years. A close scrutiny of the responses of the respondents would reveal that all the workers who had met with accidents (124: 62%) opined that the chief cause of an industrial accident is 'machine accident', that is, an accident resulting on account of inadequate safeguards of machines in an industrial unit. Major causes of occupational

diseases as recorded by the affected respondent workers have been emission of poisonous gases, fumes, accumulation and inhalation of dust and other toxic materials, lack of ventilation, insufficient lighting arrangements in the plant. The occupational diseases actually contracted by the respondents due to the peculiarities of their job have been described as 'pnuemoconiocis', 'cancer', eye-trouble', 'tuberculosis', 'allergic asthma', 'silicosis', 'ulcer', 'Skinner action', etc.¹⁰ However, only few of these diseases, namely 'pneumoconiosis', 'silicosis', etc., are listed as occupational diseases in Schedule III of the Act, and others are left out even though such diseases seriously impair the earning capacity of the worker.

2. Physical Facilities

The physical facilities have direct bearing, in one way or the other, on the safety and health of the workers employed in industrial units. It would be naive to suppose that industrial accidents are solely caused by carelessness. They too occur owing to other factors such as unsafe conditions of work and casual attitude adopted by the management towards duties imposed upon it by legislation in respect of machinery and physical facilities. Data has been collected in respect of physical facilities and layout of machinery which throws light on the state of safety and working conditions in the industrial units visited by the present investigator. The data thus collected has been presented in Tables 2 to 6.

(i) *Whether factory building/shed is reasonably well constructed keeping in view the items produced*

A well thought out layout of an industrial unit can to a considerable extent minimise the risk of industrial accidents and occupational disease. Conversely, it means that an industrial unit which has ignored the scientific measures in its layout is more prone to expose workers to physical hazards. Thus it may not be an exaggeration to say that monetary compensation to be paid to the worker in case of accident acts as a stimulant to the employer to provide suitable working conditions to the workers

10. See for detailed study regarding occupational diseases and claims for compensation, Bhatia, K.L.: *Administration of Workmen's Compensation Law: A Socio-Legal Study*, *op. cit.* f.n. 9.

and also to lay out his unit in a scientific manner. In other words, compensation to be paid by the employer is punitive measure for his ignoring basic minimum facilities.

Table 2

Showing the responses of the members of the supervisory staff regarding 'whether factory building/shed reasonably well constructed keeping in view the items produced?'

S. No.	Response	Frequency	Percentage
1.	Yes	64	91.4%
2.	No	6	8.5%
3.	Total	70	99.9%

Table 2 gives responses of the members of the supervisory staff regarding buildings which house the industries. A modern industrial unit must have well constructed spacious accommodation from the points of view of safety and health of workers. The building must be 'reasonably well constructed'. It should not expose workers employed therein to the vagaries of weather and to health hazards. 64 (91.4%) out of 70 opined that their factory building/shed is 'reasonably well constructed' as against only 6 (8.5%) who responded otherwise, that is, their factory building/shed is not 'reasonably well constructed'.

The above officials were further asked to list the shortcomings, if any, so far as their factory building/shed is concerned. Their responses have been presented in Table 3.

Table 3

Showing the responses of supervisory staff regarding 'what are the shortcomings in the factory building/shed?'

S. No.	Response	Frequency	Percentage
1.	Nil	13	18.4%
2.	No Response	57	81.3%
3.	Total	70	99.7%

It is significant to note that only 13 (18.4%) respondents were fully satisfied regarding their factory building/shed; while 57 (81.3%) have not given any response. The respondents were asked to list specifically the shortcomings in their factory building/shed. Ironically, it is clear from the data when closely scrutinised that out of 64 (91.4%) respondents who stated that their factory building/shed is 'reasonably well constructed' only 13 (18.4%) respondents have the feeling of satisfaction with their factory building/shed. And still they have not come forward to list the shortcomings.

Many industrial units were visited to have a broad impression regarding physical facilities. It is true that there are no norms laid down in the Factories Act in respect of layout of factory buildings/sheds etc. for the obvious reason that the size and design of the buildings will vary according to the requirements of a particular industry. However, the Act contains provisions for the allotment of minimum space in respect of each worker. The chief objective of providing minimum space for a worker in a workroom appears to be to prevent overcrowding, for overcrowding is not only injurious to the health of the worker but also a safety risk. It has been observed in the industrial units visited that the compliance with this legal requirement is rare particularly in respect of those factory premises which are small and privately owned. It has, too, to be admitted that the minimum space requirement is inadequate particularly in respect of factories which emit gases, fumes or dust. The state of affairs in respect of minimum space requirement in fully government undertakings and public sector in the two States is in strict compliance with the legal requirement.

The layout of factory premises also includes the design which should be functional. The factory building/shed should be constructed in a manner that it provides shelter in all seasons of the year. The materials used should be of standard quality. Furthermore, the law imposes duties in respect of maintenance of floors, steps, stairs, passages, gangways, openings in floors, etc. Ironically, it has been observed in the industrial establishments visited that the legal requirements relating to maintenance of floors, steps, stairs, etc. are rarely complied with, particularly by the

small and privately owned industrial undertakings in the two States. It was also noticed that very rarely are disinfectants used to improve accumulation of dust or fumes. No scientific methods are followed by the management to control the pollution caused owing to the dust and fumes. The polluted environment does not only cause accident but also occupational diseases.

(ii) *Opinion of the respondents interviewed regarding the ventilation of factory building/shed*

Studies in industrial labour problems suggest that there is positive correlation between production and ventilation on the one hand, and ventilation and rate of industrial accidents on the other hand.¹¹ Good ventilation generates hygienic working conditions for the workers.

Table 4

Showing responses of the supervisory staff on 'whether factory building/shed is reasonably well ventilated'?

S. No.	Response	Frequency	Percentage
1.	Excellently ventilated	9	12.8%
2.	Reasonably well ventilated	52	74.0%
3.	Poorly ventilated	9	12.8%
4.	Total	70	99.6%

Table 3 gives the opinion of the supervisory staff regarding ventilation in their factory buildings/sheds. 52 (74%) opined that their factory buildings/sheds are 'reasonably well ventilated' as against only 9(12.8%) who felt that they are 'poorly ventilated'. Respondents expressed that their factory buildings/sheds are 'excellently ventilated'.

11. See in particular Giri, V. V.: *Labour Problems In Indian Industry*, 1972, pp. 298-320; and see also Morris S. Viteles, op. cit., note 5, supra, pp. 492-493 and 364-368.

(iii) *Opinion of the respondents regarding the lighting arrangements of the factory premises*

Studies of the specialists pertaining to industrial labour problems indicate that there is a positive relationship between lighting and accidents, layout of the machinery and accidents, and production and layout of the machinery in an industrial plant.¹² The responses of the members of the supervisory staff with regard to lighting arrangements in the factory premises visited have been recorded in Table 5.

Table 5

Showing the responses of the supervisory staff regarding lighting arrangements in the factory premises

S. No.	Response	Frequency	Percentage
1.	Properly lighted	30	42.7%
2.	So so lighted	24	34.2%
3.	Poorly lighted	16	22.8%
4.	Total	70	99.7%

Table 5 shows that 30 (42.7%) members of the supervisory staff felt that their factory premises are 'properly lighted'; while 16 (22.8%) expressed that they are 'poorly lighted'. The other responses of the respondents are no less significant wherein 24 (34.2%) stated that their plants are 'so so lighted' or 'poorly lighted'.

The state of ventilation and lighting of the factories is of utmost importance and to have a first hand knowledge of these basic needs, it is necessary to visit numerous factories in the States of Jammu and Kashmir and Punjab. Establishments which are located in industrial sectors of the towns were not generally found deficient in the matter of ventilation. It is, however, to be remembered that many small units are located in crowded locali-

12. Giri, V. V., *op. cit.*, note 11; and Morris S. Viteles : *op. cit.*, note 5, *supra*, pp. 368 and 482-492.

ties of the town and are privately owned. In such units the compliance with the statutory requirements of maintaining in every workroom adequate 'ventilation' as well as 'temperature' does not seem to have been implemented. Unless these units are removed from these localities, the owners cannot undertake alterations, because of compulsions of space, to achieve objects of the legislation which aim at preventing injury to body and health of workman. Only in one of the industrial units visited the process of humidification was being used to bring down the temperature. In many industrial units which were visited during summer months, the workers were performing their duties in suffocating atmosphere. Inspections by the inspectors appointed under the Factories Act are rare and these do not seem to be a cause of worry to employers of industrial units.

It has also been observed while conducting the field survey that in most of the industrial units the lighting arrangements are inadequate particularly in the passages.¹³

3. Layout of the machinery: Is the machinery in the plant systematically and safely laid out?

Table 6 shows the responses of the members of the supervisory staff in respect of layout of the machinery in their plant.

Table 6

Showing responses of supervisory staff on: 'Has the machinery in the plant systematically been laid out?'

S. No.	Response	Frequency	Percentage
1.	Yes	68	97%
2.	No	2	2.8%

It is apparent from the table that 68(97%) respondents felt that the machinery in the plant is 'systematically laid out'. Only an

13. Ironically, a worker in a woollen weaving factory who was asked to give his responses as to adequacy of lighting remarked that a 200 watts bulb had recently been fixed over the portrait of a V. V. I. P. in the passage which had incidently solved the problem pertaining to that particular passage.

insignificant number of respondents 2 (2.8%) expressed that the machinery in their plant has 'not been systematically laid out'.

It would seem from the data presented in the above tables (2 to 6) that in the opinion of the members of the supervisory staff minimum physical facilities as to building, ventilation, lighting and machinery do exist in the industrial undertakings where they work. It also appears, in the opinion of the respondents, that reasonably good working conditions have been ensured for the workers.

The data on the parameters recorded in Tables 2 to 6 was not collected from the workers. The questions on these parameters were not included in the final interview schedule administered to workers. The questions, however, were placed on the original schedule but on 'pretesting' it they were dropped. It became clear while 'pretesting' the schedule that these questions would not be useful, because 100% 'qualified' answers, that is 'no response' to these questions from the workers had been obtained. Because of gross illiteracy of the respondent-workers, they were, presumably, not capable of understanding the significance of 'reasonably well constructed factory building', 'ventilation in the factory building', 'lighting arrangements in the factory premises', and 'layout of the machinery'. The chief concern of the workers appears to be to earn their bread, and not to bother to educate themselves in respect of their working conditions and physical facilities. Shortcoming in any of these facilities, however, increases the rate of industrial accidents.

Welfare Measures

It is axiomatic that conditions of work are not limited to safety at work but also include measures which provide a healthy environment for work. It is not sufficient that the workers have a safe place of work; it is equally important that they should have leisure, recreational facilities, and rest to minimise fatigue and strain of work. The Factories Act, 1948, therefore, has provisions for welfare of workers which include opening of canteens, provisions for creches, facilities for taking lunch and rest etc. An overstrained or overworked workman is prone to accidents inasmuch as there is a limit to human endurance. Section 44 of

the Act imposes an obligation on the employer of an industrial undertaking to provide facilities for sitting for all workers obliged to work in a standing position who may avail of these facilities whenever they get an opportunity to take rest in the course of their work. In addition, every factory employing more than 250 workers must provide and maintain a canteen.¹⁴ The employer must provide accommodation, furniture and other equipment for the functioning of the canteen. The objective of providing a canteen in a factory is not only to supply food, beverage and other foodstuffs to the workers at reasonable and, if possible, subsidised charges, but also to provide an opportunity to workers to refresh themselves in a relaxed atmosphere away from machines. In managing the canteen a committee consisting of the representatives of both the management and the workers has to be constituted. It is also laid down that the management of an industrial establishment wherein more than 150 workers are employed shall provide and maintain suitable and adequate shelters or rest rooms and a lunch room.¹⁵ It is astonishing that no minimum requirement in respect of these elemental facilities have been prescribed for factories employing less than 150 workers. All factories irrespective of the number of workers employed therein must be required to have a room which the workers would use for taking lunch and other recreational purposes.

The Act also contains provisions relating to providing and maintaining creches in factories where at least 50 women workers are employed. These must be clean and properly ventilated.¹⁶ The creches must be under the charge of a woman specially trained in looking after the infants and children. Besides, an employer is required to provide intervals or breaks of at least half an hour during the working hours which the worker may use for any purpose.¹⁷

It has been observed that in majority of cases arrangements for sitting for workers required to work in a standing position do not

14. S. 46 of the Factories Act, 1948.

15. *Ibid.*, S. 47. Shelters or rest rooms and a lunch room must have a provision for drinking water.

16. *Ibid.*, S. 48.

17. *Ibid.*, Ss. 51, 54 and 55. The weekly hours and daily hours of work for an adult worker are 48 hours in a week and 9 hours in a day respectively.

exist. In only a few factories some inadequate facilities of this type exist. In small and privately owned industrial units of the two States there are no canteens for the reason that the number of workers is less than 250. However, the fully government owned factories and public limited concerns do provide canteen facilities even though the number of workers does not exceed the statutory minimum. It may be recalled that in the State of Jammu and Kashmir the provisions of the Workmen's Compensation Act, 1923 apply to all industrial establishments irrespective of the number of workers. In the State of Punjab, only the small and privately owned units are covered under the provisions of Workmen's Compensation Act. Likewise, government owned industrial units and public limited concerns in the State of Jammu and Kashmir do provide a rest room for the workers to be used by the workers for shelter, rest, recreation or lunch. In most of the small and privately owned units of the two States, the rest room facilities for the workers are conspicuous by their absence. The discussion pertaining to intervals or breaks during working hours has been presented below. The facility of creches was found only in one cotton spinning factory of a public limited concern in the State of Jammu and Kashmir. Ironically, the creche room in that factory was used for storing cement.

Data has been collected in respect of welfare measures which attempts to provide an insight into this important area.¹⁸ In order to know empirically the state of welfare measures information was collected on the following two matters :

- (i) Is fatigue the determining factor in increasing the number of accidents? ; and
 - (ii) Are breaks allowed, say, for lunch, tea, dinner, etc. during the course of working hours; and occurrence of accidents during breaks?
- (i) *Is fatigue the determining factor in increasing the number of accidents?*

Fatigue cannot be defined as an independent term.¹⁹ It is

18. See, in particular, note 1, *supra*.

19. Literally, fatigue means weariness from bodily or mental exertion. Fatigue in this sense may be muscular, nervous and mental. Poetically,

correlated with a number of factors. Lack of recreational facilities, absence of rest during working hours, inhuman working conditions, that is, inadequate ventilation, lighting, atmospheric conditions, etc., may contribute to fatigue. The availability of recreational facilities, such as rest during working hours and humane working conditions, can minimise or reduce fatigue, and consequently, lessen the risk of accident. The absence or lack of these facilities can escalate fatigue and increase the risk and rate of accident.²⁰

Research investigations in the United States of America and Continental Europe have shown clearly that the accidents rate tend to increase with each successive hour of work in the morning, reaching a maximum at proximately $3\frac{1}{2}$ hours after the start of work, then falls towards zero at the noon hour. The rate of accidents rises again steeply after the noon hour reaching a peak towards the later part of the afternoon but dropping off to an extent during the last hour of the work.²¹ A comparison of hourly distribution of accidents with production curves show that in the normal day accident rate varies with the rate of production, being highest when the production is highest, and lowest when the production is lowest. Thus there appears to be a high degree of statistical correlation between production and rate of accidents on the one hand and fatigue and accidents on the other. The drop in the rate of accidents in the last hour of the morning or in the afternoon period when the worker is expected to be more fatigued is explained by the reduced rate of production which occurs with increased fatigue in the last hour

industrial fatigue is defined :

Work—Work—Work

Till the brain beging to swim ;

Till the heart is sick and the brain denumb'd

As well as the weary hand.

(Thomas Hood : *The Song of the Shirt*) quoted by Morris S. Viteles, *op.cit.*, note 5, *supra*, p. 438.

20. Morris S. Viteles, *op.cit.*, note 19, pp. 356-368 and 438-511.

21. *Report On The Condition Of Women And Child Wage Earners In The United States*, Vol. II, Employment of Women in the Metal Trades, Senate Doc. No. 645, 61 Congress 1911, as quoted in Morris S. Viteles, *op. cit.*, note 19, *supra*, p. 356.

of the work. There are, however, certain studies which do not support this traditional viewpoint that fatigue is the determining factor in increasing the rate of accidents.²² However, till now it has not been possible to negative the conclusion on the basis of any contradictory statistical data. The rationale behind providing facilities to the workers in terms of ventilation, lighting, atmospheric conditions, giving breaks to the workers for eating and recreational activities is to lessen the fatigue which in turn helps to reduce the rate of accidents at least in the initial periods after the break when the production is not optimum. In our own country no study showing relationship between fatigue and accidents appears to have been conducted. But our policy planners do follow the results of the studies of other countries and try to imitate them in improving the working conditions of workers.

(ii) *During the course of working hours are breaks allowed for lunch, dinner, tea, etc. ; and occurrence of accidents during breaks?*

In industrially advanced countries studies have been conducted which establish a relationship between fatigue and frequency of accidents. Since breaks for lunch, recreation and rest reduce fatigue, the present investigator heuristically collected data by administering the questionnaire to the members of the supervisory staff and the workers in the industrial undertakings of the two States on 'during the working hours are they allowed breaks'. The responses of the respondents interviewed for the purpose have been recorded in Table 7. The data has not been presented against their educational background, social and economic status because the author did not find any significant as well as meaningful variation while crosstabulating the data in such from.

22. H. H. Vernon: *Industrial Fatigue and Efficiency*, London, 1921, p. 264, quoted in Morris S. Viteles, *op. cit.*, note 19, *supra*, p. 358.

Table 7

Showing the responses of the supervisory staff and workers on: 'During the course of working hours are you allowed breaks for lunch, dinner, tea, etc.'

S. No.	Respondents	Response		Total
		Yes	No	
1.	Supervisory Staff	62 88.6%	8 11.4%	70 100%
2.	Workers	178 89%	22 11%	200 100%

Table 7 shows that 62 (88.6%) members of the supervisory staff stated that they get a break for half an hour at 1 p.m. (4½ hours after the start of work); while only 8 (11.4%) expressed that they do not get any break. This latter category of supervisory staff were employed in small and privately owned industrial units distributed in both the States of Jammu and Kashmir and Punjab. The Table further reveals that responses of the respondent-workers correspond exactly to those of their supervisors. 178 (89%) workers stated that they get the break for half an hour duration as against only 22 (11%) who responded otherwise. This half an hour interval is permitted to the employees to have their lunch, dinner (in case of the employees working in night shifts), tea and to avail of recreational facilities.

Table 8 shows the responses of the supervisory staff and workers regarding their activities during the breaks allowed to them for lunch, dinner, tea, etc. Such information has been tabulated against the area to which they belong (urban and rural).

Table 8

Showing the responses of the supervisory staff and workers regarding their activities during the breaks

S. No.	Response	Area location of the respondents			
		Supervisory Staff		Workers	
		Rural	Urban	Rural	Urban
1	2	3	4	5	6
1.	Newspaper and other reading material	1 6.6%	6 10.9%	—	—
2.	Gossiping/Chit Chat	1 6.6%	1 1.8%	14 9.6%	1 1.8%
3.	Just relax	12 80%	46 83.6%	131 90.3%	53 96.3%
4.	Trade union activities	1 6.6%	2 3.6%	—	1 1.8%
5.	Total	15 99.8%	55 99.9%	145 99.9%	55 99.9%

The Table indicates that most of the members of the supervisory staff with urban background 48(83.6%) out of 55 'just relax' and do not indulge in any activity. 12(80%) respondent-supervisors out of 15 with rural background, too, do not do anything but 'just relax'. The response pattern of the respondent-workers is just the same. 53(96.3%) respondent-workers out of 55 with urban background 'just relax' and do not engage themselves in any activity except relaxing themselves. Likewise, 131(90.3%) workers out of 145 with rural background, too, spend the break in 'just relaxing'. It is crystal clear from the Table that only an insignificant percentage of the respondents in both the categories engage themselves in other activities such as trade union activities and newspaper reading, or playing indoor games.

While conducting the field survey it was observed that in the small and privately owned industrial units no recreational facilities

such as indoor games materials, television sets, radios, etc., are provided. But in public concerns in the State of Jammu and Kashmir (public and government concerns both) the minimum recreational facilities are available. These include provision for a hall for recreation and playing indoor games. It was also observed that such facilities in public concerns remain largely unutilized.

It may not be out of place to mention here that the accidents occurring during the breaks, which are regular feature in a particular industrial unit, are included in the ambit of Workmen's Compensation Law. The element of duty appears to have been liberally interpreted when accident occurs during break time. The liberal approach to duty-element has given rise to the development of new doctrine in the arena of Workmen's Compensation Law, namely, the positional risk doctrine or notional extension or environmental extension or going or coming rule and the doctrine of added peril. Such accidents are supposed to have taken place out of and in the course of employment. In this connection it may be pertinent to quote Arthur Larson, a noted authority on workmen's compensation law. He emphatically states :

Recreational or social activities are within the course of employment when (1) they occur on the premises during a lunch or recreation period as a regular incident of the employment ; or (2) the employer, by expressly or impliedly requiring participation, or by making the activity part of the services of an employee, brings the activity within the orbit of the employment ; or (3) the employer derives substantial direct benefit from the activity beyond the intangible value of improvement in employee's health and morale that is common to all kinds of recreation and social life.²³

Accidents and the National Commission on Labour

The National Commission of Labour has gone into the causes of industrial accidents and made some valuable recommendations. As to the causes of accidents it has rightly commented that inadequate inspection of industrial establishments by the inspec-

23. A. A. Larson, *The Laws of Workmen's Compensation*, Vol. I, p. 349.

tors of factories alone does not explain the trend of accidents.²⁴ There are other factors responsible for the occurrence of accidents, such as human failure due to carelessness, ignorance, inadequate skill and improper supervision, rapid industrialisation, expansion or modification in existing factories, setting up of new industries involving hazards not known earlier, lack of safety consciousness on the part of both workers and managements, inadequate realisation of the financial implications of accidents.²⁵ The main recommendations of the commission on safety in factories include (i) measures for safety, (ii) training in safety, and (iii) safety equipment,²⁶ and effective enforcement of these recommendations. The commission also indicated measures for achieving the desired goal of ensuring safety at work.²⁷ In order to lessen the widening social distance between management and the factory inspectors, the commission felt the need of developing frequent and informal contacts with the management and the labour unions on the part of the inspectorate of factories to conduct an inquiry in case of every accident and give wide publicity to the findings among workers of the concerned industrial establishment. It also expressed the opinion that the employers have to play a special role in generating safety consciousness. Accordingly, it desired that safety should become a part of a ritual or formality. The commission opined that safety should not be made the subject matter of bargaining. As to the mechanism for providing safety at work, the commission, *inter alia*, recommended involvement of labour unions in safety promotion; active participation of workers in matters connected with safety; setting up of 'safety committees' to be run with the assistance of factory inspectorates; appointing safety officers in industrial units prone to accidents; institution of programmes in safety for managerial personnel, supervisors and workers by the factory inspectorates, inclusion of industrial safety as a subject in the syllabi of all technical institutes such as Industrial Training Institutes which train substantial number of skilled workers for industrial establishments.

24. *Report of the National Commission on Labour*, Govt. of India, 1969, pp. 95-110 at p. 100.

25. *Ibid.*

26. *Ibid.*

27. *Ibid.*

But that as it may, it would take some decades to implement even the most important recommendations of the Commission. For the purpose of our study these recommendations only indicate the direction in which reforms should proceed.

Medical examination of young persons

The importance of medical examination at the time of recruitment and periodically thereafter cannot be minimised. Section 69 of the Factories Act lays down that any young person who wishes to be employed in any industrial undertaking must produce a fitness certificate from the qualified surgeon. The certifying surgeon must mention in the medical fitness certificate that the young person has attained the prescribed physical standards and that he is fit for a full day's work in a factory as an adult. The certification must be done on the basis of personal knowledge of the medical officer of the nature of employment, its hazards and the medical feasibility of employment of youthful person for the job. The certificate of fitness is valid only for a period of twelve months. It may be granted or renewed only after a fresh medical examination. The purpose of medical examination is to reduce the incidence of accidents by keeping out persons medically unfit to undertake hazardous employments. However, this purpose could be accomplished only with respect to young persons, that is, persons under 18 years of age. The law does not impose this obligation on the employer in respect of adults. There is no logical reason for their exclusion. There is good reason to believe that susceptibility to accident and occupational disease is more in case of sick and medically unfit workers. Susceptibility to accident may be the end result of a combination of forces reflecting a generally lowered physiological effectiveness of a kind that causes or appears in frequent illness. A positive correlation between minor sickness and accident and occupational disease is reported to exist.²⁸

In view of this the respondents (supervisory staff and workers) were asked to record their responses regarding the medical exami-

28. See E.M. Newbold: "A Contribution to the Study of Human Factors in the Causation of Accidents", Ind. Fat. Res. Ed. Rep., No. 34 (1926), p. 74, as quoted by Morris S. Viteles, *op. cit.*, note 19, *supra*, pp. 341, 349 and 352.

nation of a worker before recruiting or hiring him on a job and its periodical repetition. Such responses have been represented in Tables 9 and 10.

Table 9

Showing the responses of the supervisory staff and workers regarding medical examination of a worker before recruiting or hiring him on a job

S. No.	Response	Respondents	
		Supervisory Staff	Workers
1.	Yes	39 55.7%	65 32.5%
2.	No	29 41.4%	135 67.5%
3.	No Response	2 2.8%	0
4.	Total	70 99.9%	200 100%

Table 9 gives the responses of the members of the supervisory staff and workers regarding medical examination of a worker before recruiting or hiring him for a job. The table shows that 39(55.7%) members of the supervisory staff asserted that medical examination of a worker is conducted before recruiting or hiring him on a job; while 29(41.4%) reported that no such medical examination is carried out. The response pattern of the respondent-workers on this account is significantly different. The preponderant number of respondent-workers 135(67.5%) reported that no medical examination is conducted before recruiting or hiring a worker on a job as against 65(32.5%) who reported that medical examination is conducted before recruiting or hiring a worker on a job.

Table 10

Showing the responses of the supervisory staff and workers regarding medical examination repeated later

S. No.	Supervisory Staff		Workers	
	Response	Frequency	Response	Frequency
1	2	3	4	5
1.	Yes	13 33.3%	Yes	16 24.6%
2.	No	26 66.6%	No	49 75.4%
3.	Total	39 99.9%	Total	65 100%

Of the 39(55.7%) members of the supervisory staff who reported that medical examination is conducted, 26(66.6%) expressed that no such examination is periodically reported later. Similarly, of the 65(32.5%) workers who reported that medical examination is conducted at the time of recruiting or hiring a worker on a job 49(75.4%) expressed that no such medical examination is periodically repeated later.

These findings are significant and to a large extent explain the difficulty connected with determination of disability caused as a result of occupational disease. In any case, it is evident that employers are generally reluctant to conduct medical examinations either at the time of recruitment or periodically thereafter.

Duties of the Workers

It may be recalled that the Workmen's Compensation Act, 1923 imposed an absolute obligation on the employer to pay compensation to the injured workman in the event of an industrial accident arising out of and in the course of the employment. The Act, however, exempts the employer of the absolute liability in respect of any injury, not resulting in death, caused by an

accident which is directly attributable to the workman having been at that time under the influence of drinks or drugs, or wilful disobedience and removal or disregard by the workman of safety devices provided for the purpose of securing the safety of workman.²⁹ That is, the employer is not responsible to pay compensation to an injured workman when workman's own conduct has been the sole cause of the accident. In other words, the Workmen's Compensation Act expects the observance of certain duties by the workers while at work. It is difficult to procure the data with regard to the number of accidents caused under the influence of drinks or drugs, or by the wilful disobedience and removal or disregard of safety devices by the workers. Obviously, no worker would like to affirm that the accident was caused solely due to his wilful disobedience, removal of a safety appliance or disregard of a mandatory rule, or under the influence of drinks or drugs.

Findings and Conclusion

Industrial accidents are a cause of great concern in the present century. According to the recent report of Labour Bureau,³⁰ India's average daily number of workers employed in industrial establishments covered under the Workmen's Compensation Act, 1923 is, roughly, 41, 30, 359. That the rate of accidents is high is indicated by the fact that the compensation was paid for 57, 346 accidents in the year 1971.³¹ There are numerous causes ranging from unsafe conditions of work to unforeseen contingencies which account for the high rate of these accidents. In this paper an attempt has been made to determine on the basis of the field studies through scientific techniques the causes of industrial accidents which include cases of occupational diseases.

29. S. 3(1)(b)(i), (ii), (iii) of the Workmen's Compensation Act.

30. Labour Bureau, Ministry of Labour, Govt. of India, Chandigarh, Annual Review on the working of the Workmen's Compensation Act, 1923 for the year 1971 (published in September 1978), p. 35.

31. *Ibid.*, the break up detail of various kinds of accidents as given in this report is as under:

1. Death.....	1,101	(0.27%)
2. Permanent disablement.....	3,046	(0.74%)
3. Temporary disablement.....	53,199	(12.88%)
4. Total	57,346	(13.88%)

It is well known that physical facilities have a direct bearing on the state of safety and health of workers. There are statutory requirements which an employer of an industrial unit must comply with to promote industrial safety. A cross section of supervisors and workers was contacted to gather through questionnaires information on the state of safety and physical facilities obtaining in the industrial units. The study reveals that only an insignificant number of respondents are fully satisfied with regard to facilities available in the factory building/shed. Most of the workers, however, have not been able to articulate the shortcomings. The state of ventilation and lighting seems to be of requisite standards in industrial units constructed in modern planned industrial estates. It is, however, a matter of grave concern that a good number of industrial units owned by small entrepreneurs and located in crowded localities pose a great threat to the health and well-being of the workers. These units also contribute in no small measure to industrial accidents. With regard to the safe laying out of the machinery and its maintenance the data reveals that whereas the supervisory staff are satisfied on this account, the workers did not give any meaningful response.

In industrially advanced countries correlation between accidents and fatigue has been established. The rationale behind providing suitable conditions of work and giving breaks to the workers is to lessen their fatigue which in turn helps to reduce the rate of accident. Our study reveals that in most of the industrial establishments breaks of half an hour interval are given. An overwhelming majority of workers relax during this period. It was, however, observed that in small and privately owned industrial units recreational facilities are conspicuous by their absence. It would seem that no serious thought has been given to the recommendations of the National Commission on Labour on accident prevention. Unless this is done it is not possible to bring about any meaningful change in the present state of affairs in the industrial units.

BONDED LABOUR IN A SEMI-FEUDAL SEMI-CAPITALIST SOCIETY

JAYARAM PANDA

Indian society and economy of the present time may be categorised as semi-feudal semi-capitalist. In such a society bonded labour is a necessary historical accompaniment. So long as such a structure of society persists bonded labour will exist, legislative and other legal reform measures for their abolition notwithstanding. It is only in a fully developed capitalist society that the worker also develops from the state of full bondage to the so-called state of free labour (free in the sense of selling his labour power at his own will and choice). Such a development is called by the Marxists as the growth of full-fledged proletariat. The existence of bonded labour in India is a clear index of our society having not even capitalistically developed, not to speak of the development of democratic socialist society. The disappearance of bonded labour is connected, then, with the socio-economic transformation of the semi-feudal semi-capitalist society of India. Mere slogans, reform measures, legislative measures may at best remove the symptoms but not the disease.

Protection of labour is only possible through the labourers themselves. The eyebrows of the legal pundits may be raised at this statement but the historical and structural realities cannot be so easily ignored. The slaves abolished slavery to transform the society to feudalism and serfs abolished serfdom; so also the working class transformed capitalism to socialism. This historical fact suggests that it is only the revolutionary consciousness of these classes that helped them to protect themselves from the yoke of exploitation and change the system from one order to the other more progressive one. The maturation of revolutionary consciousness is dependent on the structural realities of the time.

* Lecturer, P. G. Department of Economics, University of Jammu, Jammu Tawi 180 001.

Our concern here is about the 'bonded labour' system prevailing in a developing capitalist society. This clearly suggests that either the society is not a fully capitalist one or the hangover of feudal relations still persists. Be that as it may, the existence of bondage system in the rural countryside and tribal areas in India directs us to depict the colonial hangover still continuing.

The concern of the present venture is to analyse the bondage system in its historical and structural context, to suggest a tentative solution for its abolition keeping in view the directive principles of State policy. Before analysing the problem of bonded labour system in India, the present state of the situation and a definition of the said bondage system is warranted. "Bonded labour system as defined today is the partial system because it covers only those bonded labourers who were made so by the landlords-cum-moneylenders with the help of institution of dept bondage contract" (Kamble: 3). The reason is poverty which keeps the poor dependent on the moneylender who in return for loans forces the underprivileged to work free or for nominal wages in his hands. The section of people under study in J&K State are being paid nominal wages only for their survival to repay the so called loan they or their parents have taken from the moneylender which (the loan) under compound interest has increased enormously. Illiteracy is understood to be the reason for this compound rate of interest to double the principal amount within a year's time. Marla Sarma is of the view that even "the government cannot guarantee the protection to the weaker sections because of the inherent weakness of the system" (1977: 428). In an article in EPW titled 'Bonded Labour Invisible to Official Eyes' it is mentioned that "a poor person could not raise his voice against the creditor even if such frauds (in terms of interest) were traced because the entire power structure used to support the creditor" (1976: 1754). It is rightly pointed out by Kamble that "rules as well as courts used to favour such rich persons" (1982: 4). This process of pauperisation and functioning of slavery in the form of bonded labour system cannot be so easily fought by either the judiciary, legislature or executive because they mutually seek support and continue to be dependent on each other.

Despite the Slavery Abolition Act of 1843, slavery continued all through the British regime in the form of forced or bonded labour (Borale, 1968: 109). In independent India the President of India promulgated the Bonded Labour System (Abolition) Ordinance in 1976, in order to wipe out the evil of the bonded labour system yet this evil practice continued and will continue until the structural forces which form the basis of such an evil system are corrected. In between 1843-1975 many State governments passed laws banning bonded labour system like Kamia Agreement Act, 1920 of Bihar, Moneylender Act, 1938 of Bihar, Debt Bondage Abolition Regulation Act, 1940 of Orissa and Madras, Bombay Moneylender Act, 1946. Article 23 of the Constitution of India made bonded labour a punishable offence. Rajasthan Agricultural Policy Act, 1954 and Sargari Abolition Act, 1961, Laccadives Minicoy and Aminidivi Islands Revenue and Tenancy Regulation Act, 1965, Bonded Labour Abolition Act of Kerala, 1972, Scheduled Castes/Scheduled Tribes and Denotified Tribes Debt Relief Ordinance of U. P., 1974 were some of the important Acts passed in response to the constitutional provisions against bonded labour. Yet the evil practice continued.

We are here reminded of Marx, who said that "even under an excellent legal system, the economic system would function in such a way that workers would not be able to enjoy their freedom" (Popper, 1973: 123). Bonded labour was officially abolished in 1975 by a Presidential Ordinance, but to no one's surprise it still persists. Although the Act (1976) declares the bonded labour as "stand freed and discharged from any obligation to render any bonded labour" but nowhere it promises that the freed bonded man shall be the master of his own labour (Vyasa: pp. 134-35). However, there are cases where some of the bonded labourers have been freed from bondage. This so called freedom of the bonded labourers "could not succeed to the desired extent, because liberation of bonded labourers or agrestic slaves without provision for subsistence lead again to the bondages. Ironically, many of them in spite of their release, had to beg for their bondages when their masters refused to accept them as bonded labourers". Consequently.....many of them had to agree to the terms and conditions of the masters, which were worse than what

they were before the promulgation of the Ordinance (Kamble: p. 136).

"In pre-colonial times, the widespread form of compulsory labour throughout much of South Asia gave the Chief, the Headman or the feudal overlord the power to commandeer labour for part of the year, often for such purposes as building and maintaining roads and irrigation canals." (Myrdal: 968) European colonists found a tradition of unfree labour well established at the time they arrived in Asia. The forms ranged from outright slavery to the "attachment of bonded workers and differed from country to country.... Thus it came to pass that the indigenous system of forced labour, which colonial rule inherited, was adopted to induce large-scale movements of labour". "The general scheme", according to Royal Commission on Labour, was "that the labourer was bound by a contract to serve for a specified period...." if he failed to work without reasonable cause, or absconds, he could be punished criminally...." (Myrdal: 971-72, footnote). The supply of labour in case of India in colonial times was through migration and mostly at the place of emigration they were bonded by the moneylenders-landlord combine and for this act of using migrant bonded labourer "the government granted them certain statutory rights.... These rights empowered the owners to carry on the practice of indentured labour. (S. J. Patel: 1952, p. 133) the remarks of W. Nassau Lees in his "Land and Layout of India" on the contractors of labour in Assam Tea Plantation are worth quoting. He wrote: "False representation, corruption and oppression of every and the worst description were used to swell the numbers of the contractors recruits. The old and the decrepit, the young and the tender, the halt, the maimed and the blind—nay, even the infected, the diseased and the dying—were pressed into the service of the most degraded" (quoted by Myrdal, p. 972, footnote). The main concern of the colonial masters was to supply the British capitalists with cheap, docile and disciplined labour. Out of the two models of exploitation mentioned by Vyas the feudal model wherein "the feudal lords exploited directly as well as through the structure they devised in their hierarchical political system based on power and authority" (p. 7) is not contemporarily applicable but the "Mahajan model"

where the Mahajan exploited the weaker sections of the society through economic transactions including loans. In these cases extraction of money, land, land produce and manual services from the debtors was done.

After independence, however, the traditional Mahajan model did operate but in our area of study it has been seen that either the educated-unemployed sons of these moneylenders or otherwise were drawn to the trade. The traditional moneylender lacked mobility so the bonded labourers created in the process were not possibly used in the locality itself. The unemployed graduates who were otherwise vagabonds could be profitably used in the trade and they with a gang of bonded labourers moved to those places where work was available.

In the labour-surplus economy like India, inter-regional migration of the labour force became an obvious phenomenon. The centres of immigration are those places and States where capitalist production relation has started operating. Haryana, Punjab, Delhi, J & K are the States which attract more of the labour force of bonded type from the semi-feudal and over-populated centres like Chattisgarh (M. P.), Orissa, Bihar and Eastern U. P. The bonded labourers from Orissa, who are brought to these areas (including J & K), are termed as "Dadan" while they are known as "*Halias* and *Muliyas* or *Naga Muliya* in Orissa". (Kamble: pp. 4-5) The "*Dadan System*" is very often mechanically created and which is only possible in a semi-feudal system. The labourers are bonded for a period of minimum six months. In the place of immigration they are given one kilogram of rice and fifty paise for fuel and salt consumption per day. In addition they get Rs. 100 per month to repay the loan because of which they are bonded today. A rough estimate of their daily earning is Rs. 5.

The minimum wage passed by the government of Orissa is Rs. 5 per labourer irrespective of sex. During sowing and harvesting days even, the labourers are maximally paid Rs. 4 per day. Distinction of sex is also prevalent in the sense that the female labourers are paid Rs. 3 per day.

But our observation in maximum cases tells that the bondage situation is not created only due to hunger or less income but due to either no income for six months in the slack season or when need arises the parents take loan from the moneylender or from these unemployed graduates, the broker for bondage, with a contract that the son will be in bondage for one or more seasons. The needs are very often social needs like marriage and death, when the loan is given with the contract for bonded repayment.

For the agrestic slave system which was confined to the rural countryside and was used in the agricultural sector before independence, now the situation has changed. The changed situation is of unemployment of the bonded labourers. So the masters searched for new areas where jobs are available. This led to the migration of these labourers to distant places which I call as the revival of mercantile-colonial system in the modern times. Now the labourers thus moved out and at the place of work they are cheap, docile and disciplined for the employers' benefit. In terms of labour time they work at least for fourteen hours a day and are paid nominal wages (Rs. 5) while in J & K State other normal labourers get Rs. 10-15 per day for 8 hours time. This explains the cheapness of the labour. Since they are under the control of masters and "they were acclimatised and were made to accept the slavery as a way of life . . . and psychologically they like others, were not prepared even to question the system as they were totally brainwashed" (Kamble: pp. 133-34) they are docile. These agrestic slaves are kept aloof from the changes in the outside world and their movements are controlled by the masters. So there is no opportunity to get themselves organised in the form of trade unions. This unorganised character of these labourers makes them disciplined too.

Solutions so far suggested by different social scientists are many. But I doubt if any of them will help in the matter. The multistructural Indian economy where the unequal development process has led to capitalistic development in some regions while other regions are in semi-feudal state the capitalistic development has not reached that state where we could think of automatic

abolition of bondage. For example, use of bonded labourers in the brick kiln industries in Punjab and Haryana, the so called capitalistically developed States, make us believe that the state of affairs is semi-capitalist.

Then the need for structural change here demands change of the semi-feudal semi-capitalist society to a fully capitalist one. With capitalistic development and mechanisation of agriculture and change in land ownership pattern the use of bonded labourers will be minimised.

The Ordinances and Acts by themselves cannot help in abolishing the system. The directive principles of State policy clearly indicate the structural imbalances and direct for the changes in ownership and distribution of wealth. Land reforms were thought to be a measure to achieve the goal, "but the landlords cleverly transferred their lands on the names of their family members. Moreover, with the increase in population in the farm families and subsequently division of such families lead to distribution of their lands among their family members. Thus the size of landholding is going down, as a result demand even for hired labour is declining. But the reduction in the size of holding land did not get to the tillers as desired. On the contrary the rural rich took the benefit of education and got jobs in urban areas but continue to own their lands only to use bonded labourers and reap benefit from the land.

"Consciousness about the economic hardships of the poor was exhibited in the protective legislations passed against indebtedness and exploitation. But even this did not redeem the sufferings of the bonded to a desired extent" (Vyas : 134) and agrarian production relations cannot be changed without dislodging the traditional power structure.

Among other solutions suggested and implemented to an extent are to free the bonded labourers and to rehabilitate them. By the end of 1977 a little over 1,00,000 bonded labourers were freed but fewer than 30,000 were rehabilitated. It is unreasonable to presume if rest of them have not already returned to bondage, for the hungry might find it preferable to starving. In

this situation P. G. Herst is not wrong to say that bondage provides the bonded labourers and his family with at least bare minimum of subsistence. He further argues that "if steps are taken to effectively abolish the different forms of bonded labour and minimum wages are actually enforced, then the option open to the land owner, if not on economic grounds, than to keep themselves out of labour problems, is to invest in a tractor.... In a short time even the little food they were given in bondage would not be available to them (1976 : 360).

Under this condition even the enforcement of the Agricultural Minimum Wages Act will not result in anything better because the detection of the persons bonded has become difficult when such labourers are now scared of losing the minimum they are getting. Thus it is agreed upon to infer that it is only with the change in the production relations that the abolition of bondage system is possible. The source of creation of bondage is the rural countryside, so the need is to change the production relations there first. Land reform has remained a failure and the exploitation by the moneylenders is increasing. It may be agreed that the mode of production is changing or has changed towards capitalism (only in some pockets) but the change in the "mode of production" does not necessarily indicate the change in production relations also (R. S. Joshi, 1978 : 208).

But here (in particular) in case of bonded labourers we have seen that the cheap, docile and disciplined condition keeps them unorganised and without organisational consciousness and at the moment the revolutionary change in the production relations is not possible. P. G. Herst rightly observes, "to continue with a policy which does not assist in transforming the rural social and economic structure and caste system from within is to continue living in the past and leave to hope for the future", and he further states, "to try to do this... by means of law... appears to be like trying to catch a shark with a piece of string" (quoted in Vyas : 137).

Yet if the legal pundits are sincerely interested to do something immediately they are, thus, asked to suggest the non-committal politicians and corrupt bureaucrats to get themselves busy in getting the things done.

That indebtedness is the root cause of bonded labour has been the consistent opinion of all those social scientists who have studied the problem. In other words it is the debt-bondage contract which keeps the bonded system continuing. Hence the need to stop the institution of moneylenders and to do so the replacement is the rural banking but not in the way they operate today. Now the banks only help through security or the collection of instalments in a harsh manner. The moneylender was only interested to compound the interest rate to double the principal amount and he was not in a hurry for repayment. Banks are particular about the loan repayment and visit the villages at regular intervals. (It has been seen that the officials enter the villages, the loanees flee.) Moneylender in the present case was not interested in cash repayment but through kind i.e. labour service—so bondage. This has become the culture because the parents take the loan only to repay through the bondage of their children. To repay the debt of the parents is considered to be an act of *puniya* by the son or else hell is the destiny. A thing which has become customary cannot be easily changed because customs are dihard. So the suggestion would be that let the banks also give loan through debt-bondage contract. This reforms the situation in the sense that now instead the bondage is to an individual master the labour is bonded to the Bank (a social institution). Let the government take care that the Public Works Department or Gram Panchayats are given the contract of constructing buildings, ponds, roads etc. and the concerned banks should be associated with the scheme. The banks now can supply labourers to the contractors and the wage will be paid by the bank to the labourers, while at the time of payment the repayment of the loans can be easily done. The benefit of this alternative bondage system is that:

1. The needy can get loans in time.
2. Since the bank is involved, interest on loan will not be high.
3. Payment of wages now will not be nominal.
4. Exploitation in terms of labour time is not possible, and

5. With the abolition of moneylenders, the structural relations will start changing in the rural countryside.

REFERENCES

- "Bonded Labour Invisible to Official Eyes", *Economic and Political Weekly*, Vol. XI, No. 45, November 6, 1976, p. 1754.
- Borale, P. T. : *Segregation and Desegregation in India: A Socio-Legal Study*, (Bombay: Manaktalas, 1965).
- Herbst, P. G. : "A Note on Rural India", N.L.I. Bulletin Vol. V 1976.
- Joshi, R. S. : "Bonded Labour and Their Fantasy", N.L.I. Bulletin 1978, Vol. XII.
- Kamble, N. D. : *Bonded Labour in India* (New Delhi: Uppal Publishing House, 1982).
- Lees, W. Nassau : *The Land and Labour of India: A Re-survey*, (London; 1867).
- Myrdal, G. : *Asian Drama: An Inquiry into the Poverty of Nations*, Vol. II (New York Vintage Books, 1970).
- Patel, S. J. : *Agricultural Labour in Modern India and Pakistan* (Bombay: Current Book House, 1952).
- Popper, K. R. : *The Open Society and its Enemies*, Vol. II (London: Routledge and Kegan Paul, 1973).
- Sarma, Marla : Bonded Labour in Medak District (A.P.) in National Labour Institute Bulletin, 1977.
- Vyas, N. N. : *Bonded and Exploitation in Tribal India*, (Jaipur Rural Publications, 1980).
- Ghouse Mohammed : "Agrarian Reform: Power Politics vs: Social Engineering, X (4) 1983, Indian Bar Review, 599.

SOCIO-ECONOMIC ASPECTS OF CHILD LABOUR IN INDIA

A. N. SADHU*

AND

AMARJIT SINGH**

Child labour is a social evil which has to be eradicated. The volume of child labour in a country is the index of the extent of poverty on the one hand and an index of apathy and defective legislation to deal with the problem of child labour on the other hand. Socially, it is a disgrace for the society to exploit its children in utter disregard of moral and social values that any civilised society may be expected to maintain. From economic point of view it is a wastage of a productive resource and a criminal misuse of the potentialities that could serve the future much more productivity than what they might be contributing at present.

The problem of child labour is a global phenomenon, though it might be more severe in the developing countries. We have indications that the child labour is on an increase in India which may be partly due to increased demographic pressures and partly due to perpetual problem of poverty in our country. Whatever might be the reasons for the existence of child labour and whatever may be the pattern of its distribution it is the problem facing the world community and demands that it (world community) rise to the occasion and resolve to take effective steps to eradicate this ugly blot on the face of human society.

In order to recognise the importance of children in the society the United Nations rightly decided to observe the year 1979 as the International Year of the Child. Such a decision has focussed world attention on the problems of child labour and several programmes have been chalked out under the auspices of I.L.O. to study the problem of child labour.

* Professor and Head of the Department of Economics, University, Jammu.

** Reader, P. G. Department of Economics, University of Jammu, Jammu.

Extent of Child Labour

Children constitute over 35 percent of the world's population. Their number has already crossed 1500 million by 1979 and by the year 2000, child population is expected to account for one-fourth of world population and 40 per cent of its labour force. The increase in the number of children between 1975 and 2000 is expected to be of the order of 72 per cent in Africa, 48 per cent in Asia, 47 per cent in South America, 10 per cent in the United States and 4 per cent in Europe. According to I.L.O. data, more than 52 million children between 6 and 14 years age in the world are employed in variety of occupations out of which 29 million are in South-East Asia and 9.1 million in East Asia. The magnitude of child labour has been estimated at 27 per thousand population in Africa, 14 in Asia, 6 in South America and one in both Europe and United States. Since the population estimates of 2000 indicate an enormous rise in child population in countries infested with serious child labour problems, the severity of child labour problem is quite likely to increase further if no substantial steps are taken to check it.

The problem of child labour manifests itself in two different forms. In one, the child labour is used without any remuneration and in the other, it is paid mere subsistence wage. The children who work without wages are mainly those engaged in family farms and other family enterprises besides those who have been handed over to the unscrupulous exploiters in discharge of an obligation and those who had been separated from their parents owing to abject poverty and destitution.

According to I. L. O. data, more than 52 million children between 6 and 14 years age in the world are employed in a variety of occupations out of which 29 million are in South-East Asia and 9.1 million in East Asia.

Out of the 52 million child labourers, 42 million workers work without any remuneration in family farms and other enterprises and 10 million are working for wages in different callings such as workshops, tea shops, factories etc. This estimate of 52 million child labour in the world may be a rough estimate because it does not include those children who work on part-time

basis. Moreover, in many countries of the world children under 15 years age are not covered by statistical surveys. Child labour is employed on construction sites in Asia, West Asia, Latin America and Southern Europe. In some parts of Central America, West Asia, girls even below the age of 7 years are brought from their respective homes and virtually sold to work like slaves.

In our country, millions of children are denied the advantages associated with childhood; they are prematurely rushed into adult roles and responsibilities. According to the last census (1971) 41 per cent of India's population or as many as 228 million are children under 14 years of age. A study of available figures shows that in 1968-69, only one in every three children of the 11-14 age group could continue in the school stream. This means that out of 37 million children aged 11-14 years, a clear 25 million were already at work whether in the rural or in the urban setting. The children who should normally have been in schools and should have received proper rear and care are put to hard work ranging between 12 to 16 hours a day. Not only are they employed at a very young age, but their working conditions are pitiable. They are paid the lowest wages and are entitled to no other benefits.

Besides low wages, child labour is also characterised by uncertainty of employment, shifting employers and jobs, lack of trade unionism and casualism. Child labour, perhaps, presents one of the best examples of an information sector of a labour market. Several considerations enter into the fixation of wages, through bargaining power and the extent of economic compulsions that decide the wage to be paid by an employer.

A statement showing the age-distribution of child population in India as in 1971 is given in Table 1.

Table I
Child Population in India (1971)

Age Group	Total	Males	Females
(In Millions)			
Below 1 year	16.2	8.2	8.00
1 to 3 years	45.2	22.9	22.3
4 to 6 years	53.3	27.7	25.6
7 to 11 years	74.8	38.7	26.1
12 to 14 years	38.5	20.6	17.9

According to 1971 census, there are about 230 million children in the age group 0-14 years in the country. They constitute 42.02% of the total population. The number of child workers who are less than 15 years, according to the census, was placed at 10.74 million representing 4.7% of the total child population and 5.9% of the total labour force. The incidence of child labour was highest in Andhra Pradesh—9% of the total labour force and 3.7% of the total population of the State. In fact, Andhra Pradesh alone accounted for 15.2% of the total child workers in the country, followed by Madhya Pradesh where child labour constituted 7.3% of the total labour force and 2.7% approximately of the total population of the State. The child labour was expected to increase to 17.36 million by 1983.

The extent of child labour in different callings according to 1971 census is depicted in Table II.

(See Table II on next page)

Table II
 Number of child workers and total workers by sex and nature of activity in 1971
 (Figures in thousands)

S. No.	Nature of activity	Total Workers		% of Total	Child Workers		% of Total	% of Col. 9 to Col. 5		
		Males	Females		Males	Females				
1.	Cultivators	68910	9266	78176	43.34	3124	746	3870	36.03	4.95
2.	Agricultural labour	31695	15794	47489	26.32	3004	1582	4586	42.70	9.65
3.	Livestock, forestry, fishing, hunting, plantation, orchards etc.	3514	783	4297	2.38	743	142	885	8.24	20.59
4.	Mining & Quarrying	799	124	923	0.51	15	9	24	0.22	2.60
5.	Manufacturing, processing servicing and repairs etc.	14871	2196	17067	9.46	440	213	653	6.08	3.82
	(a) Household industry	5021	1331	6352	3.52	199	139	338	3.14	5.32
	(b) Others	9851	865	10716	5.94	241	74	315	2.93	2.93

6. Construction	2012	203	2215	1.22	42	17	59	0.54	2.66
7. Trade and Commerce	9482	556	10038	5.56	197	14	211	1.96	1.10
8. Transport, storage & Communication	4255	146	4401	2.43	36	6	42	0.39	0.95
9. Other services	13537	2229	15766	8.74	282	123	405	3.77	2.56
10. Total	149075	31298	180373	100	7885	2854	10739	100	5.95

Source : Census of India, 1971 Series-I—India. Paper 3 of 1972—Economic Characteristics of Population (Selected Tables), Registrar General and Census Commissioner, India, New Delhi, 1973, pp. 2-73.

It is evident from Table II that the maximum number of working children is in agriculture followed by livestock, fishery and plantation.

The facts revealed by the enquiries recently made about child labour in India are most hair raising. A survey conducted in carpet weaving industry in Kashmir shows that about 80,000 to one lakh children, between 6 to 14 years, in the valley are engaged in carpet weaving. They work about 10 to 12 hours a day and earn a total of Rs. 10 to 15 daily. It is customary in the valley that craftsmen and artisans introduce their children to their occupations at a very early age.

Another survey conducted by a social service organisation in Saharanpur (U. P.) reveals that around 10,000 child workers below 14 years of age are engaged in wood carving industry where they work for about 14 hours a day and are paid a meagre sum of Re. 1 per day.

In Banaras, which is famous for silk weaving and embroidery, about 51,000 children are presently engaged. Similarly, in an important centre of silk weaving in Bihar, another 10,000 children are engaged in this trade.

Another study conducted by the National Institute of Public Cooperation and Child Development in the city of Bombay has revealed some startling facts. According to this study, about 30 per cent of the children employed started their work before the age of 6 and on an average, they work from 10 to 11 hours a day.

A pilot study of working children conducted in Madras, Madurai and Coimbatore stated that 31.6 per cent of children worked 10 to 11 hours a day, 23 per cent worked from 12 to 13 hours a day and 12 per cent worked from 14 to 16 hours a day. In Sivakasi (Madras) 40 to 45 thousand children are engaged to run the wheels of the factories. They work from 11 to 13 hours a day and receive a piece rate wage ranging from 50 paise to Rs. 2 per day.

The incidence of child labour is also very high in tea gardens and other plantations. In 1972, it has been estimated that the average daily employment of children on plantations in Assam,

West Bengal and South India was 39,956 i.e. 5.2 per cent of the total labour force in those areas.

A survey jointly conducted by the Gandhi Peace Foundation and the National Labour Institute about the practice of bonded labour in eight States, Andhra Pradesh, Bihar, Gujarat, Karnataka, Madhya Pradesh, Rajasthan, Tamil Nadu and Uttar Pradesh reveals that about 21 per cent of the bonded labourers in these States are below 20 years of age. The percentage of labourers below 15 (child labour) was found to be 21, 10.3 and 8.7 in Andhra Pradesh, Karnataka and Tamil Nadu respectively.

Problems

(i) Low Wages

The main problem of child labour is that they are paid extremely low wages. These range from 0.50 paise to Rs. 2.00 per day. Even judging by poorest standards of living, the wage is just not enough to provide even the subsistence living to the child. It, therefore, results in malnutrition on the one hand and hard physical labour on the other which subjects the child work to constant deterioration in terms of health and medical care and shortens his life span in the long run. It has a social dimension as well. Inadequate wages compel him to resort to social evils such as stealing, snatching and pickpocketing.

(ii) Long Working Hours

The working hours of the child worker are unbelievably too long. He works for 12 to 16 hours a day. Before the affluent children are awake, the unfortunate child is at the workshop, sweeping, dusting and cleaning the shelves of his owner. He is to collect water for drinking, get cigarettes for his boss and obey all odd orders from his superior counterparts in the workshop. He is not even permitted a breathing space. He has no time to relax and replenish his energies or to have some recreation. He does not know the world beyond his routine.

(iii) Insecurity

He is under constant threat and depression to lose his job. There is no law to protect him. There is no insurance, no

provident fund and no pension for him. He is at the mercy of the unscrupulous master. He stays or goes according to whims and ways of his superior.

(iv) Loss of Talent

The more serious problem, in fact, is that child labour results in a considerable waste of national talent. Given the proper rear and care, education and training, who knows the child working in a workshop may have turned to be a great scientist, physician or a philosopher. Larger the extent of child labour, greater is the waste of national talents.

Programmes

A pertinent question arises as to what are the social and economic compulsions of the households that supply these tiny tots to the unscrupulous employers for arduous jobs. The cause is not far to seek. Economic growth, no doubt, has taken place in India in the last thirty years but it has resulted in concentration of economic power in a few hands and created a wide gap between the rich and the poor. "With the widening gap between rich and poor, between villages and urban areas, the fragile structure of the society naturally disintegrates forcing the weak and the innocent to become victims of exploitation." Abject poverty forces the parents to send their children to seek employment. Agricultural indebtedness and surplus manpower in the primary sector have also forced the children to work. Several Acts have been legislated for the protection and the welfare of the child but it appears that these have been of no avail. While as the legislations enacted bar the entry of children into the organised sector, their economic compulsions force them to accept low paid jobs in unorganised sector where other measures of welfare are also lacking.

Total abolition of child labour in India in the present context may not be possible but it is strongly recommended that the government may evolve a strong all India machinery to see that children in India are not exploited. Besides taking steps to enforce the existing legislative machinery strongly, it will have to be seen that children work in the jobs which are safe, secure and

healthy and get proper remuneration for their work. So long India remains a poor country with about 50 per cent population living in abject poverty, it will be too much to hope that the extent of child labour in India will show any decline in future.

From an economic point of view, it would be of interest to form an idea about the loss that the society might be expected to suffer by sending children to work at an early age. Such an idea cannot be formed without taking into consideration the economic value of children which in general may be put as equal to the difference between benefits and the costs of children. Direct quantification of benefits and costs of children is not an easy task though the latter is less complex than the former.

The difference also occurs according to the stage of socio-economic development of the society. The cost of care and rear of the children in developing nations is less than that of the developed industrialised nations. On the other hand, benefits from children to their parents in the developed countries are treated as negligible if not nil altogether.

In case of developing countries, like the one in which we live, the children have two types of benefits. One way they hold benefits for the family they belong to and the other way they hold benefits for the society as a whole. Social costs for bringing up children consist of the cost of educational institutions, hospitals, parks, playgrounds, etc. Family costs range from the costs incurred on maintaining an expectant mother, opportunity costs and direct costs incurred on bringing up the child.

Social benefits flow from the innovative ability, intellectual capacity and creative potential of a child when he attains an adult role. These virtues of a child do not grow at all or do not grow into full length if he has been subjected to conditions inconsistent with his age and hence a society is a loser not only at the present but in the future as well. Society may lose good many scientists, litterateurs and innovators if a portion of their child population is forced into work owing to one or the other reason. On family basis, children have socio-psychological and economic value for their parents in particular and other kith and kin in

general. A child who grows into full potential will certainly yield better returns for his parents than when he is forced to work at an early age. It shall not be difficult to perceive the disadvantage of child labour even in this regard.

It is, therefore, required that legislations banning the child labour be implemented effectively and also rationalised wherever and whenever needed to stop the process of impoverishment of a developing economy.

ROLE OF LAW TOWARDS PREVENTION OF EXPLOITATION OF CHILD LABOUR

SURESH C. SRIVASTAVA

1. The Issues

Child labour, which is a centuries old phenomenon, has been one of the most neglected and exploited class of human labour. According to 1980 Report of the Bureau of Statistics and Special Studies of the ILO, more than 52 million children were employed in a variety of occupations. Of these, South East Asia accounted for 29 million followed by 10 million in Africa, 9.1 million in East Asia,¹ 3.1 million in Latin America, 700,000 in Europe, 3,00,000 in North America and 10,00,000 in Oceania.² India is one of the major countries of the world to have employed a good percentage of child labour. According to 1971 census there are 10.74 million child workers in the country of whom nearly 10 million that is 93.6% are employed in rural areas. Out of these about 78.7% are employed as cultivators and agricultural labourers. Of the remaining, 8.2% are engaged in livestock, fishing, plantation and orchards, about 6.0% in manufacturing process and another 6.0% in household industries. The rest are employed in trade, commerce, transportation and storage.³ However, according to the National Sample Survey estimate the country's child labour force in 1978 reached at 16.25 million.⁴ Be it as it may, a State-wise survey reveals that "Andhra Pradesh has the largest child labour force of 9.0% of the total of country, followed in Karnataka with 7.9%.

* LL. D. (Calcutta) : Chairman, Department of Law and Dean, Faculty of Law, Kurukshetra University, Kurukshetra.

1. Rupa Kaul: "Millions for Arms but Pittance for Children", *Economic Times*, January 6, 1980, p. 4. See also "World's Working Children need Protection against Exploitation", *Concern*, December, 1978,
2. *The Statesman*, January 28, 1980, p. 6.
3. *Economic Times*, November 23, 1975, 3.
4. Sevanti Ninan: *Child Labour in India* (mimeographed), 1978-79, submitted to ILO, p. 7.

The number of child workers in West Bengal is estimated at 5.11 lakhs. Most of the children are employed in hotels, restaurants, sweet shops, small engineering, foundries, automobile repair shops and as cleaners for buses and taxis. Ragpickers are also generally the children below the age of 14. They generally work for private contractors and are made to work between 12 to 16 hours. They are also employed in book publishing concerns and binding shops.⁵ From this it is evident that a considerable number of child workers are employed in agriculture and few in industrial sector.

The evil of employment of children in agriculture and industrial sectors in India is a product of economic, social and, among others, inadequate legislative measures. Social evil involved in the employment of children are widespread illiteracy resulting in lack of development of child's personality (which may continue even in his adult life), negligence and indifference of the society towards the question of child labour.⁶ There is also lack of proper appreciation on the part of parents as to how continuance of children in education would benefit their employment prospects and improve their standard of living.⁷ The economic problems involved in the employment of children are in no way less significant. The poverty resulting in inadequate family income and the desire to supplement compelled children to work. Indeed, the parents of low income group like artisans cannot afford to educate their wards even if education is free. For them an uneducated child is an asset; desire to be educated becomes a double liability because of:

(a) loss of earning if the child did not work, and

(b) expenditure on education howsoever small.⁸

Thus the economic evils have not only deprived children at work from education but also led to high infant mortality, morbidity and malnutrition, particularly, in weaker sections of the society

5. See Rupa Kaul, *op. cit.*, *supra*, note 1, p. 7.

6. See *Child Labour in India* (Ed. M. K. Pandia), 1979, p. 54.

7. *Ibid.*

8. See the *Report of the National Commission on Labour*, 1969, p. 386.

in urban areas.⁹ The indifference of the legislator to provide adequate legislation to regulate the employment of children has failed to minimise the growth of child labour. The socio-legal problems involved in the employment of children in agriculture and industries are: (a) Is it feasible to abolish child labour particularly of those (i) who are orphans, destitutes, neglected, and abandoned children; (ii) children who have to work for a living; (iii) children belonging to migrant families; and (iv) handicapped children? If not, what should be done mediately and immediately. (b) Should the child labour be banned in hazardous employment? If so, what are these employments? (c) what should be the minimum age for the different kinds of employment? (d) what should be the duration of their work including rest interval? Is it desirable to adjust the working hours in such a manner to provide for schooling of children? (e) what privileges should be afforded to them in matters of leave and holidays? (f) what protection should be afforded to them in matters of health, safety, welfare? These problems set the boundaries of this paper.

II. Abolition of Child Labour : Not Practicable

Can the child labour be abolished? This issue may be answered in the negative, particularly in the present state of affairs where millions of families are below the poverty line and they have to deploy their children in the labour market in order to eke out a bare subsistence. In view of this the National Seminar on Employment of Children concluded :

Any legislation totally prohibiting child labour would virtually amount to inflicting on these children an unbearable suffering. Moreover, in the absence of possible alternatives, such a measure is likely to aggravate rather than mitigate their misery and hardships.¹⁰

Thus the total eradication of child labour is neither feasible nor desirable in the foreseeable future unless basic human needs which includes food, shelter, clothing and educational facilities are provided to all people.

9. See *Hindustan Times* dated 24-10-1980.

10. *Supra*, note 3.

In order to meet the aforesaid situation policy should be framed both for the long run and short run. In the long term policy it is necessary to create conditions by providing proper climate and social security, educational training and other facilities in order to gradually eradicate child labour. In the short run it is necessary to eliminate and minimise the impact of adverse conditions¹¹ affecting child labour, and to improve working condition of children. This can be done by regulating (i) hours of work, (ii) weekly holidays, (iii) leave, (iv) health, (v) safety, (vi) welfare and (vii) among others, social security.

III. Scope of Legislative Prescriptions for Child Labour Limited

In order to regulate the minimum age and working conditions of child labour the following legislations have been framed :

- (i) Children (Pledging of Labour) Act, 1933 ;
- (ii) Employment of Children Act, 1938 ;
- (iii) Factories Act, 1948 ;
- (iv) Mines Act, 1952 ;
- (v) Plantation Labour Act, 1951 ;
- (vi) Merchant Shipping Act, 1961 ;
- (vii) Apprentices Act, 1961 ;
- (viii) Motor Transport Workers' Act, 1961 ;
- (ix) Atomic Energy Act, 1962 ;
- (x) *Beedi* and Cigar Workers' (Conditions of Employment) Act, 1966 ;
- (xi) State Shops and Establishments Acts.

Quite apart from the aforesaid legislation the Minimum Wages Act, 1948 regulates the minimum wages of workers (including child labour).

However, the aforesaid legislation covers a very limited section of child labour. Thus the Factories Act, 1948 covers only

11. See the recommendations of the National Seminar on Employment of Children (25-28 November, 1975, Delhi) quoted in *Child and the Law* (Ed. Pande), 1979, p. 37.

the premises where manufacturing process is carried on and employing 10 or more workers where power is used, and 20 or more workers where power is not used. Like the Factories Act, the scope of the Mines Act is also limited. Similarly, the Plantation Labour Act does not apply to plantations measuring less than 10.117 hectares. Likewise the Employment of Children Act does not apply in several establishments, viz., building construction. But the Supreme Court in *Peoples Union for Democratic Rights v. Union of India*¹² found that it was hazardous work and it should be included under the Act. In response to the Supreme Court decision the Central Government issued a direction to the States to include building construction industry within its fold. Further, Merchant Shipping Act does not bar employment of children (except trimmers and stokers) in home trade, ships of less than 200 ton gross, or in any other ship when the child is employed on nominal wages and in charge of his father or other adult male relatives.¹³ Moreover, there is no law regulating employment of children in air transport, in land vessels and fishing vessels.¹⁴

However, there is no legislation (except those covered by the Plantation Labour Act and the Minimum Wages Act, 1948) which is applicable to child labour in agricultural and unorganised sectors which employ about 10 million i.e. 93% of the total child labour in terms of 1971 Census. Thus it is high time to have some legislation dealing with the child labour in such employment.

IV. Minimum Age of Employment : Not Uniform

The other problem is with regard to the fixation of the minimum age of the child. Article 24 of the Constitution prohibits the employment of children below the age of fourteen years in any factory, mine or in any other hazardous employment. "This is a constitutional prohibition which, even if not followed up by the appropriate legislation, must operate *proprio vigore*".¹⁵

12. (1982) 3 SCC 235.

13. S. N. Jain: "Preventive Legal Measures in the area of Child Labour", *National Seminar on Child & Law*, National Institute of Public Cooperation, 1982, p. 118.

14. *Ibid.*

15. *People's Union for Democratic Rights v. Union of India*, (1982) 3 SCC 235.

Further, Article 24 is plainly and indubitably enforceable against everyone and by reason of its compulsive mandate, no one can employ a child below the age of 14 years in a hazardous employment.¹⁶ This provision raises a question as to what are the "hazardous" employments. It is, therefore, necessary to identify the employment which may be called "hazardous" employment. In such employment, it is submitted the minimum standard regarding age should be rigorously enforced. But in other employments it may be fixed at 10 or 12 years.

In order to fix the minimum age for employment of children different statutes prescribed different age. For instance, the Factories Act, 1948 prohibits the employment of children below fourteen years of age in factories.¹⁷ The Mines Act prohibits not only the employment of any "child",¹⁸ but even the presence of a child in any part of the mine which is below ground or in any open cast working in which any mining operation is carried on.¹⁹ The Plantation Labour Act prohibits the employment of children below twelve years of age in any plantation. Under Apprentices Act, 1961 no person shall be qualified for being engaged as an apprentice to undergo apprenticeship training in any designated trade unless he has completed fourteen years of age. Beedi and Cigar Workers (Conditions of Employment) Act, 1966 prohibits employment of children below 14 years of age in any industrial premises. The Motor Transport Workers Act, 1961 prohibits the employment of children in the motor transport undertakings. The Children (Pledging of Labour) Act, 1933 declares void an agreement to pledge the labour of children below 15 years by the parent or guardian of a child in return for any payment or benefit. The Employment of Children Act, 1938 also prohibits the employment of children below the age of 14 in workshops connected with bidi making; carpet weaving; cement manufacture, including bagging of cement; cloth printing; dyeing and weaving; manufacture of matches; explosives and fireworks; mica cutting and

16. *People's Union for Democratic Rights v. Union of India*, (1982) 3 SCC 325, p. 463.

17. S. 67.

18. "Child" means a person who has not completed fifteen years.

19. S. 45.

splitting; shellac manufacture; soap manufacture; tanning and wool cleaning. A perusal of the age for employment prescribed in all the States Shops and Commercial Establishments Acts reveals that the minimum age varies from 12 to 14.²⁰

Thus, there is a variation in regard to the minimum age for employment of children. Be it as it may, the aforesaid legislation covers extremely limited occupations and that too in an extremely limited domain. The question of standardisation of the age of the child was examined by a Working Group appointed by the Department of Social Welfare, Government of India, in 1974. It came to the conclusion that it was not feasible "to standardise the definition of the age of a child for application in all cases". It, however, pointed out that it may be possible to have uniformity of age in specified area for specified purposes.

V. Working Hours for Child Labour

A few surveys which have been undertaken to assess the working conditions of child labour reveal that the working hours of child labour are beyond human expectation. It is hard, cruel

20. State/Union Territory	Age Definition of Young Persons
Andhra Pradesh	14-17
Bihar	12-18
Gujarat	12-17
Himachal Pradesh	14-18*
Haryana	14-18
Jammu and Kashmir	12-18
Maharashtra	12-17
Kerala	14-17
Madhya Pradesh	12-17
Mysore	12-15
Orissa	12-15
Punjab	14-18
Rajasthan	12-15
Tamil Nadu	14-17
Tripura	12-15
Uttar Pradesh	14-17
West Bengal	12-15
Chandigarh	14-18
Delhi	12-18
Pondicherry	14-18

* In Himachal Pradesh Act, 'Young Person' means a person who has attained the age of 14 years but has not attained the age of 18.

and inhuman even to hear of children working for sixteen hours in eighties in twentieth century. However, a recent I. L. O. report submitted to the United Nations Sub-Commission for fight against discriminatory measures and the protection of minorities,²¹ has highlighted that "about 28,000 children, some of them only five years old, were working in match factories in India for 16 hours a day from three in the morning."²² Similarly, NIPCCD study reveals that (i) "children worked for long hours of work and average was 8.86 hours per day."²³ Likewise, a survey of child labour in Bombay shows that "the restaurant children would wake up nearly 2 hours before sunrise, put fire to the oven, wash the utensils, cups and plates, sweep the floor and arrange the furniture. They would then associate themselves with the preparation of tea, snacks and other breakfast items. They would serve the customers and perform varieties of chores till 11.00 p.m."²⁴ This is true in many other parts of India. Under the circumstances, State cannot remain a mere helpless spectator in this state of affairs.

In order to meet the aforesaid situation the Factories Act prescribed four and a half hours of work per day for children. The Mines Act also prescribed the same working hours for an adolescent who does not possess a certificate from a certifying surgeon. The Shops and Commercial Establishment Acts of various provinces also provide for different daily hours of work for young persons. The Plantation Labour Act, 1951 does not, however, prescribe any limitation on daily hours of work. While the Factories Act, 1948, the Mines Act, 1952, the Plantation Labour Act, 1951, the Employment of Children Act, 1938, the Motor Transport Workers Act, 1951, *Beedi & Cigar Workers (Conditions of Employment) Act*, 1966, and the States Shops & Commercial Establishments Acts prohibit the employment of children and in some cases even of young persons, but the provisions vary in respect to age and the duration of night.²⁵

21. See Jain, S. N.: "Child Labour", JILI 1 *et. seq.* (1981).

22. *Ibid.*

23. *Ibid.*

24. *Ibid.*, p. 127.

25. The prohibition in factories is from 10-00 p.m. to 6 a.m. for child between 14 & 17 years of age, in mines from 6 p.m. to 6 a.m. both for adolescent

VI. Holidays and Leave

Every child worker is allowed a weekly holiday under the Factories Act,²⁶ Weekly Holidays Act,²⁷ Mines Act, Motor Transport Workers Act,²⁸ and *Beedi* Workers (Conditions of Employment) Act.²⁹

Most of the labour legislations provide for annual leave with wages for children. Under the Factories Act, 1948,³⁰ Plantation Labour Act, 1951,³¹ the Motor Transport Workers' Act, 1961³² and the *Beedi* & Cigar Workers (Conditions of Employment) Act, 1966,³³ a child worker who works for more than 240 days or more during a calendar year is entitled during the subsequent calendar year for leave with wages at the rate of one day for every fifteen days of work performed by him during the previous calendar year. The Shops and Commercial Establishments Act of various provinces also provide for different periods of earned leave in different States. The Mines Act does not make separate provisions for annual leave with wages for children. The reason is obvious. Only adolescents are allowed to work in mines and for the purpose of the Act they are deemed to be adults for which annual leave with wages have been provided in the Act.

VII. Health, Safety and Welfare

The Factories Act disallows the young person to clean, lubricate or adjust any "part of a prime-mover or of any transmis-

i.e. 15 years of age and also for persons between 16 and 18 years of age; in plantations between 6 p.m. to 7 a.m. for a person who has not completed 14 years, under the Employment of Children Act, from 10 p.m. to 7 a.m. for persons between 15 and 17 years; under the Motor Transport Act, between 10 p.m. and 6 a.m. for persons who have completed 15 years but not 18 years; under *Beedi* and Cigars Workers (Conditions of Employment) Act from 7 p.m. to 6 a.m. to persons between 14 and 18 years and in States Shops and Commercial Establishment varying from 6 p.m. to 8 a.m.

26. S. 71(3).

27. S. 4.

28. Ss. 19 & 20.

29. S. 21.

30. S. 79(1).

31. S. 30.

32. S. 27.

33. S. 26.

sion machinery while the prime-mover or transmission machinery is in motion or to clean, lubricate or adjust any part of any machine if it is likely to expose her or him to risk or injury from the part".³⁴ The Act further prohibits the employment of children in any part of a factory for pressing cotton where the cotton opener is at work. But, if the feed end of the cotton opener is in a room separated from the delivery and by a partition extending to the roof or to such a height as the Inspector may in any particular case specify in writing, children may be employed on the side of the partition where feed end is situated.³⁵

VIII. Conclusions

The problem of child labour can hardly be solved by raising the minimum age of child to 15 as suggested by Committee on Child Welfare. It is submitted that unless basic human needs are provided to all people which includes food, shelter, clothing, educational facilities, the root evil cannot be eradicated only by prohibiting employment of children raising minimum age of employment.

There is no uniformity in the labour legislation in regard to minimum age, working hours, holidays, leave and health, safety and welfare of child labour. They vary from Act to Act. Further, small industries do not have any provision to regulate working conditions and welfare of child labour. Furthermore, the definition of "child" and "young person" is also not uniform in different legislations. Moreover, barring some provisions in Plantation Labour Act and the Minimum Wages Act, agricultural and unorganised sectors are without any protection. Further, there is no labour legislation which seeks to regulate working hours or prohibition of work during night in domestic services, unorganised sectors and to casual labourers. In such employments working children must be prevented from exploitation, unregulated working hours and hazardous conditions of work. Under the circumstances it is suggested that there should be a comprehensive legislation including legislation for child labour employed in rural and unorganised sectors. However, in making

34. S. 22(2).

35. S. 27.

such legislation it is necessary to keep in mind the practical difficulties and problems of enforcement.

Access to education and training is not only a basic human right recognised in international instruments but is also a key factor for social progress and in reducing a gap between socio-economic group. Denial of opportunity to the children which may be due to economic difficulties, is of serious concern and a way has to be found to give the child the necessary education in his more receptive years.³⁶ It is, therefore, necessary to implement the recommendations of the National Commission on Labour, namely, (i) that hours of work of child labour be fixed in a manner so as to enable them to attend to schooling³⁷ and (ii) where the number of children is adequate, the employers, with the assistance of State Governments, should make arrangements to combine work with education.³⁸

The scope and coverage of the Factories Act is limited. It is, therefore, suggested that the Act should be amended to extend the provisions of the Factories Act in all manufacturing processes which is incidental to or connected with a factory irrespective of the number of persons employed in regard to the employment of child labour.

The Mines Act unlike the Factories Act does not specifically provide for certificate of fitness in case of employment on the surface or above the ground for adolescent, i.e. person who has completed his 15 years. Thus, it impliedly permits employment of child, on the surface of the mine, who has completed his fifteen but not completed sixteen years without any medical certificate of fitness. This lacuna in the law, it is submitted, is likely to create more hardship to child labour in mines than in factories when the work involved in the mine is harder than that of the factory. Under the circumstances it is suggested that Section 44 of the Mines Act should be amended so that adolescent is not employed unless he has been certified fit as an adult by certifying surgeon and carries a token to that effect while at work. Further, the scope of the Act should be widened.

36. *Report of the National Commission of Labour*, 1969, p. 387.

37. *Ibid.*

38. *Ibid.*

Steps should be taken to identify the hazardous and non-hazardous employment and the constitutional norms should be observed. In other employments where there is no legislation the minimum age should be 10 years.

The present penal provision in labour legislation relating to the violation of the provisions of the Act including those relating to child is insufficient to deter the employer. In order to create a deterrent effect, it is desirable to prescribe severe penalties under the Factories Act, 1948, Plantation Labour Act, 1951 and Shops and Commercial Establishment Acts. Furthermore, deterrent punishment should be prescribed when the commission of the same offence is repeated. This, in our view, will generate more respect towards the obedience of law rather than its breach.

Steps should be taken to strengthen the welfare measures, at least in organised sectors. There is a wide gap in the field of child welfare which has not been covered by legislative and administrative action. Welfare provisions for children should specifically be provided under labour legislation permitting the employment of children.

CHILD LABOUR IN CARPET WEAVING CENTRES OF KASHMIR

A. M. MATTA

Introduction

The history of mankind reveals that 'welfare of child' has been a great concern of humanity. Alongside food and shelter which keep him alive, education is equally essential for a child, the human life and happiness are largely made or marred in childhood. The future and stability of a society depend on the quality of its children. The quality of the children in turn depends upon the manner their welfare is planned. The child, as an important social unit, has to be taken care of as a whole instead of some isolated phase in his development. He is entitled to all that makes for healthy living, sufficient recreation, schooling, adapted to his natural learning methods, intelligent home care and the right to develop his abilities to their fullest extent. Amidst these values, however, nurtured the curse of exploitation and neglect of children which resulted, among other causes from the rapid growth of industry and urbanization in the nineteenth century. Children of tender age were attracted to work for unlimited hours with no minimum standards applicable. These malpractices alerted human conscience and aroused concern for the future of mankind. Many governmental and non-governmental agencies have come into being for the welfare of children, the International Infant Welfare Union, the International Child Welfare Association and Union International de Secours aux Enfants to mention a few. Since 1883 various international congresses have been held in this regard. The establishment of the United Nations International Children Emergency Fund (UNICEF) in 1946 by the United Nations General Assembly was a step further in realizing the need to ameliorate the children from their sad plight. Many Conventions and Recommendations have evolved through the International Labour Organisation

* Lecturer, Faculty of Law, University of Kashmir.

(ILO) for safeguarding children against exploitation and injustice.

As the second largest and one of the developing countries of the world India is facing the problem of exploitation of children very heavily. Efforts have been made to evolve ways and means to prevent the menace of child labour and develop child welfare to minimum desired levels. Provisions have been made in the Constitution in the form of Fundamental Rights as also the Directive Principles of State Policy for the well being and non-exploitation of children. These constitutional imperatives have been spelt out in various labour legislations that have been enacted before and after independence. The position, however, remains unchanged. India tops the world in child labour. The estimates put the number of children employed from 16.5 million to 20 million. The laws have not been implemented fully and properly. There are wide gaps in the area of child welfare which have yet to be covered by legislative and administrative action. Children continue to be employed in hazardous occupations to the detriment of their health and education. Match factories, fireworks, *bidi* industry and the unorganised rural sector depend heavily on child labour. In addition to this, petty urban sectors like tea stalls, transport (operation and repairs), *dhabas* and other eat houses, domestic services and the like are responsible for much of the child labour practices. In Kashmir Province the employment of children in the carpet weaving industry has grown considerably. Children of tender age are attracted to the weaving centres at the cost of their health, education and their future. A survey in June 1980 of some of such carpet weaving and training centres run privately and by the State as well as the Central Governments, and discussion with some authorities concerned with the implementation of labour laws prompted the preparation of this paper with a view to finding out the observance or non-observance of labour laws in the centres. This attempt to discuss the problems of child labour is being made to highlight and bring to the notice of those who are in a position to put an end to this scourge. It is only in this way that the future of the society could be protected and safeguarded, and the so called paradise on earth (Kashmir) prevented from turning into hell for the underprivileged children.

A Visit to some Carpet Weaving Centres of Kashmir

Narbal is a beautiful place about 20 kilometers north west of Srinagar—a place of orchards on the banks of river Jhelum with greenery all around. Against this background are some carpet weaving centres. One such centre is the Persian Carpet Factory wherein eleven children of the age group of 11 to 17 were working in a small dingy room, having insufficient means of light. The children were working on a handloom, a beautiful woollen carpet was being woven which when completed, would be a masterpiece of craftsmanship and fetch thousands of rupees to the employer of these children and the owner of the “workshop”. I refrain to use the expression factory which it would be inappropriate to use because the number of workers employed is below 20 and power is not used as envisaged under the Factories Act. It would not constitute a factory in the legal sense.

The following description of some workers gives an insight into their working conditions, a demonstration of non-observance of labour laws, particularly the provisions of the Employment of Children Act, 1938 and perhaps also the Children (Pledging of Labour) Act, 1933. Needless to mention that the provisions of these Central Acts have been extended to the State of Jammu and Kashmir.

(i) *Mohd. Maqbool*: The age of this boy is 14 years. He is working in the centre as a weaver for the last three years meaning thereby that he was put to work at the age of 11 years, in violation of the prescribed age limit under the statute. The boy works from 8 a.m. to 4.30 p.m. with perhaps a lunch break of half an hour.

(ii) *Noor Mohd. Teli*: Joined the weaving centre at the age of 7 years and is working for the last about ten years.

These children are paid according to the quantity they produce. The work done is paid on the basis of measurement of the carpet woven, which is done by the master craftsman (manager) of the centre. Any defect detected in the weaving results in deduction of wages. On an average the workers, as per their statements, earn about twelve rupees for every day they work.

No medical benefits are made available to them and there are no educational facilities provided. To a question the workers, however, answered that they had no complaints against the owner or the manager. The reason probably is that they do not want to risk their earnings by displeasing their employer.

Hanjewara Payoon is a small village inhabited by about one thousand people. More than forty looms have been installed by private agencies, in which 55 children of 5-7 years age group, 34 children of 10 years age and 58 children of 12-14 years age group are engaged. Children work from 8 a.m. to 6 p.m. with a small lunch break which is of little benefit as the lunch is taken within their workshops. The mud houses in which these looms are set are poorly lighted and ventilated, and whatever little natural light and ventilation creeps in has to be closed as a protection against severe cold in winter. In fact, the workshop in many cases is a multipurpose place which is used as the living room, the sleeping room as well as the kitchen. The average earning of a child is seven rupees for every day he works.

Hagarpora is a village with a population of one thousand people. There are about 60 looms of carpet weaving installed in about 50 residential houses. About 200 children, the age of most of whom ranges between 7 years to 14 years, are working on these looms. There are only ten houses out of a total number of about 60 where there is no loom installed. In one house there were three children at work on a handloom—a boy of about 16 years and two girls of 7 years and 9 years respectively. The workers weave the carpet out of the raw material (wool) supplied by the owner (employer). The boy earns an average of Rs. 10 a day and the girls get Rs. 4 each for every day of work. The parents are complacent as they get an earning of a day through their children, no matter how dangerously it affects their lives in so far as their health is concerned or how bleak their future becomes by putting them off their studies. Working in the unhygienic conditions, sitting in the same posture for hours together, the children kneel forward and their backs bent, their legs and stomach pain, they turn weak and this weakens their future as well.

In the second house that was visited, five children of 7, 9, 13 and 14 years of age were at work. Manzoor Ahmad, one child, has developed tuberculosis. However, unmindful of how his life was imperilled, he worked. A boy of just nine years, he was given 90 injections and was advised 90 more by the doctor and his earnings were perhaps insufficient to meet the expenses of treatment. This is the common fate of children working in such handlooms of carpet weaving and not only of Manzoor Ahmad.

Working under these conditions the children are likely to suffer from various respiratory and cardiovascular diseases and metabolic disorders. Such children are prone to infections very easily and chances of spread of dangerous infections like pneumonia, poliomyelitis, diphtheria, gastroenteritis in epidemic form are there. Malnutrition and disproportionate work results in various deficiency diseases. The children suffer from various deficiencies, psychiatric problems and physical disfigurements. Moreover, the general weakness makes them prone to all types of ailments very easily.

On the educational front, the carpet weaving centres have diverted children from their schools as they prefer working in those centres. Poverty undeniably is a cause of this diversion but callousness on the part of parents which is generated by their greed and a desire for money to meet their basic needs is also responsible for it. They justify neglect of studies due to high rate of unemployment among educated persons. The roll of children in one primary school in village Hangewara *payeen* fell by 50 per cent to 80 per cent in the year 1977-78. In Gendekhaja Qasim, another village of the area, there is one middle school for girls, where three lady teachers have only twenty students to teach. In yet another village, Hagarpora, in the girls primary school the number of students on rolls has come down to a bare five and out of these only three go to school regularly. Among these three is perhaps the child of the teacher who teaches there. It is not that there are no conscientious and educated people there in this area. The problem of child labour with its multiple bad effects has caught the attention of some people, who seem to be worried about the future of their

area. Their complaints and requests have, however, not been attended to by the administrators and the politicians.

Training Centres

In addition to the production centres of which a description has been given above, a large number of training centres have been opened in Kashmir Valley both by the State and the Central Governments. There are such training centres in almost every village of the area that was surveyed. There were 6500 children in 150 All India Handicrafts Board training centres in Kashmir province, as was made known by an Inspector of Factories during a discussion. A look into the working of one such centre would throw some light on the state of affairs of these centres.

Carpet Training Centre, Mazhama: This centre is run by All India Handicrafts Board, a Government of India undertaking. There is one carpet training officer appointed for the centre like all other centres. The maximum number of children taken in the centres is 50 for which selection are made. The ages of the children working in the centre range from 9-13 years and each trainee is paid an amount of Rs. 60 per month. The working hours for children are 10 a.m. to 4.40 p.m. with half hour's lunch break. We were told by the carpet training officer that education facilities are made available to the trainee children after 4.30 p. m., under Non-Formal Education scheme. According to her a teacher comes to the centre at 4.30 p.m. for one and a half hour period.

The children are given training of carpet weaving for 18 months. However, the government does not undertake to provide them jobs after the completion of their training. For training, apprenticeship agreements are entered into with the parents of the children. The master craftsman looked extremely busy in training his pupil. He, however, was conscious of the deficiencies of those centres when he disclosed that the children leave their studies after joining the training centres. The reason put forth by him was the parent's greed for money. The people, according to him, were not so poor that they could not live without the earnings of their children.

Child Labour—Violation of Constitution

The leaders of the Indian freedom movement and the framers of Constitution were well aware of the problem of child labour. They had realised its gravity, knowing that the very vitality, the sap and blood of future of India is being eaten up by the menace of child labour. Express provision was made in the Constitution prohibiting child labour in hazardous employment. Article 24 of the Constitution lays down that: "No child below the age of fourteen years shall be employed to work in any factory or mine or engaged in any other hazardous employment".

This provision is contained in Part III of the Constitution and confers a fundamental right on children. A notable feature of this provision is that unlike other fundamental rights no room has been left for any exceptions on any grounds whatsoever, the provision has been made effective by further legislation in the form of many labour laws prohibiting employment of children in hazardous and semi-hazardous occupations, and making provision for the safety and health of the workmen employed in other occupations. Article 15 which prohibits the state from making discrimination amongst its citizens contains an exception which enables the State to make special provisions for children as also women. Thus the framers of Constitution, conscious of the need to protect and safeguard the interests of children, made express provisions in this regard.

The employment of the children of tender age in the carpet weaving centres of Kashmir is a gross violation of the fundamental right contained in Article 24 of the Constitution. Besides the prohibition in the Fundamental Rights part of the Constitution the Directive Principles of State Policy enjoin taking proper care of the educational interests of the children. Article 39 lays down that:

- (e) The State shall direct its policies towards securing that the health, strength of workers, men, women and the tender age are not abused and that the citizens are not forced by economic necessity to enter avocation unsuited to their age or strength.

- (f) That childhood and youth are protected against exploitation and against moral and material abandonment.

The provisions for the prevention of exploitation of children for economic benefits are self-explanatory. Article 46, as a directive to the State in guiding its policies, provides :

The State shall promote with special care the educational and economic interests of the weaker section of the people . . . and shall protect them from social injustice and all forms of exploitation.

This provision was made in view of the economic and social inequalities prevalent in our society. The purpose was to lift the poor masses from the depths of poverty and illiteracy and bring about social justice. Here again, taking into account interests of children, a separate directive was included in Article 45 which provides that :

The State shall endeavour to provide, within a period of ten years from the commencement of this Constitution, for free and compulsory education for all children until they complete the age of fourteen years.

Such directives were in force in various States even before the commencement of the Constitution. However, these directives of State policy, it seems, are of no consequence in the State of Jammu and Kashmir, in so far as the carpet weaving centres of the valley are concerned, where the children who ought to receive education and nourishment are pushed towards a dark and bleak future. The children are made to play with not only the destinies of their own but also the future of the nation, as, by employing children in such occupations we would be producing a generation of illiterate and backward people who in this age of competition are likely to severely affect the future of the nation. The argument that these children are learning a craft which shall earn them their livelihood and that they are poor to join schools and receive education is untenable and selfish. Firstly, the State of Jammu and Kashmir is said to have free education for children up to 14 years of age. Secondly, through such child labour it is the employer who fattens his purse rather than the children getting their due returns. Thirdly, the occupation of carpet weaving has been specified as

unhealthy under the Employment of Children Act, 1948 and the health hazard that it generates is not unknown to us. The life span of such children is not only shortened but is also made miserable as these children are prone to contract serious diseases from their occupation.

No doubt the State of J & K has enacted several laws in pursuance of the constitutional mandate. Nevertheless these are not implemented. It may be instructive to discuss these laws.

Employment of Children Act, 1938

Section 3 of the Employment of Children Act, 1938 makes a clear prohibition against the employment of children in certain hazardous and less hazardous occupations. Sub-section (1) of Section 3 prohibits the employment of children who have not completed their 15 years of age in the unhealthy and hazardous occupation of transport of passengers, goods or mail by railway or a port authority.

Sub-section (2) of Section 3 permits employment of children of the age group of 15-17 years only for fixed hours of work during a day. These two sub-sections, not of direct relevance to the present discussion, shall not be discussed in detail. Sub-section (3) of Section 3 is, however, relevant for our present discussion and it is, therefore, reproduced here for ready reference.

No child who has not completed his fourteen years shall be employed, or permitted to work in any workshop wherein any of the processes set forth in the schedule is carried on.

Provided that nothing in this sub-section shall apply to any workshop wherein any process is carried on by the occupier with the aid of his family only and without employing hired labour or to any school established by or receiving assistance or recognition from a (State Government).

It is important to note at the very outset that the expression used here to denote the place of employment is workshop which definitely envisages the carpet weaving centres, irrespective of the number of persons working in a centre. These centres, therefore, are working in violation of the provision of sub-section (3) of the said Act. Moreover within the list of prohibited occupations for children under this Act, carpet weaving has also been specified.

The exception carved out for the workshop wherein the occupier carries on the process with the help of his family and without employing hired labour would not be available to the carpet weaving centres described above as the exception is envisaged for the family's own occupation and work and not for cases where the employer is a different person and not a member of the household. Moreover, the exception is laid down for the "occupier" who carries on such process with the aid of his family whereas the workers in the centre are not members of the household of the occupier. "Occupier" under the Act means a person who has the overall control over the affairs of the workshop, and it is undoubtedly the owner of the loom (employer) who has such control over the employees working as weavers. The position is thus clear that the carpet weaving centres of Kashmir are workshops where the law is being abused in broad daylight.

Factories Act, 1948

The Factories Act, 1948 prohibits the employment of children in factories and makes provision for the health, safety and welfare of the workers generally. The Act has application to 'factories' which expression means a place where a minimum of ten workers where power is used or a minimum of twenty workers where power is not used, are employed. It would, therefore, appear that the Act does not cover the carpet weaving centres where generally less than twenty workers are employed and power is not used. Under the Act, the State Governments have been empowered to extend its provisions to any establishment irrespective of the fact whether the work is carried on by power or otherwise. The legislature being aware of the exploitation practices of employers should have extended the operation of Factories Act to carpet weaving centres. In any case, the basic provisions of Act relating to health, safety and welfare are extended to all work places irrespective of the number of workers employed. Regardless of these provisions the workers, it is submitted, work in most unhygienic conditions with little or no provisions of ventilation and light, and overcrowding is common. First aid, rest rooms, lunch rooms and the like facilities are a distant dream. The children are made to work for more than ten hours a day whereas

the statutory working hours under the Factories Act are four and a half hours every day.

Children (Pledging of Labour) Act, 1933

This Act was enacted to prohibit pledging of child labour which was a common phenomenon throughout India. The position, however, has not improved much. The parents or guardians seem to have pledged the services of the children to the carpet bosses against certain benefits which may be in the form of advances of sums of money by the employer that the parent or the guardian may require for such needs like marriage, construction of a home or sometimes the procurement of essential commodities. The penalties prescribed under the Act for the parties to such agreements of child labour are too small to deter them from violating the law.

Workmen's Compensation Act

This Act was passed with a view to affording protection to a workman from losses or injury caused by accident arising out of and in the course of his employment. For the liability of the employer the following conditions have to be fulfilled :

- (1) There must be a contract of employment.
- (2) Personal injury to the workman resulting in the workman's death or permanent or temporary, total or partial disablement for a minimum of three days must be proved.
- (3) The injury must be the result of accident which accident must have arisen out of and in the course of workmen's employment.

A notable feature is that persons working under contracts of apprenticeship are covered within the provisions of the Act. The injury envisaged by the Act is not confined to physical injury only but has a wider connotation to cover all cases where the nature of work exposes the workman to perils. The cases of children contracting many diseases like pneumonia, poliomyelitis, diphtheria, gastroenteritis as also the weakness of eyesight, respiratory and cardiovascular diseases, in the carpet weaving centres, if

brought to the notice of the judiciary, shall without any hesitation, attract employers liability. Where a workman employed as an electrician had frequently to go to a heating room from cooling plant, and contracted pneumonia and died after a short illness of five days, the court held that this was an injury arising in the course of employment of the workman. The same principle would apply to the above mentioned cases.

Under the Act there are certain diseases classified as occupational diseases in Schedule III. The contracting of any of these diseases is deemed to be an injury by accident arising out of and in the course of employment unless the contrary is proved. The workman is under no burden to prove the conditions which shall be deemed to be present in every such disease. The diseases are grouped in three parts. Under Part A, wherein no specified period of employment is needed for employer's liability, the first disease specified is anthrax which is peculiar to employment involving the handling of wool and hair. This is, it is submitted, exactly what the workers have to do in carpet weaving. It is wool that they have to handle, resulting in an occupational disease for which compensation has got to be paid. It is felt that no compensation is being paid to the workmen who are children of tender age in the case of carpet weaving centres of Kashmir (where the disease results in disablement) or to their relatives (where it results in death).

It appears that the cases under the Act do not surface due to the reason that the employment of children normally is a compromise between the employer and the parent of the child, the former violating the law in employing the child and the latter giving him in employment for lust of money. The workman who in such cases is a child, being ignorant as to why he went to the weaving centre, how it was arranged and what loss he has been put to, is a figure of helplessness.

Approach of the Statutory Authorities

Having analysed some labour laws and their violation in the carpet weaving industry of Kashmir, it would be worthwhile to know the approach of those who are charged with the implementation of these laws.

On being approached, the Labour Commissioner, who is also the Chief Inspector under the statute, admitted that the provisions of various laws are being violated. According to him, complaints are also being received against these violations and the authorities take due notice of the complaints. It was acknowledged that, in violation of the Factories Act, child labour is being resorted to very frequently. Attributing the problem of child labour to economic reasons, the chief inspector pessimistically felt that there are two alternate remedies available for the prevention of child labour. One, according to him was to prosecute the offenders who he felt were so large in number that mass prosecution would have to be undertaken. This he confessed was difficult. Second alternative, according to him, was to bring down the minimum age for employment to 12 years. This he considered as a free licence for children of tender age to work in factories which he thought was impossible. It appears that the Chief Inspector, in pursuance of some policy, preferred an approach of *status quo* which he did not want to disturb, presumably because the problem was considered as a beehive, which, if touched, would give rise to many difficulties and risks. This policy is being pursued at the cost of health and welfare of children. The other reason may be that there are many administrative and legal difficulties which are technical in nature, preventing the strict implementation of labour laws in the State, particularly in the carpet weaving centres described above. These difficulties were voiced by one inspector of factories of Kashmir province when he said that the procedure under the statute is very dilatory and to prove the age of a child working in a factory or a workshop is difficult, as such children generally have no authentic municipal or school record to prove their age. Secondly, the department is understaffed with insufficient number of persons to watch and detect the violation of law. Ironically, there is only one inspector for the whole province who has to work in office as well as in the field. Thirdly, it was pointed out and rightly so, that the penalty provided under law for the cases of violation is light. A maximum of five hundred rupees fine or simple imprisonment of one month is prescribed under the Employment of Children Act, 1938 for violation. The judicial officer having the discretion exercises his discretion in favour of the

affluent employer at the cost of social welfare. This leads to patronization of the law breakers and generates and perpetuates the abuse of law. A sincere suggestion of prescribing an imprisonment of three days instead of three months, without an alternative penalty of fine, was suggested by the department with a view to make the penalty deterrent, and consequently effective. This suggestion though sincere would not be of any benefit so long as the department remains passive on the implementation front. If implemented the present laws are sufficient to enforce observance of all the labour laws in the State.

It thus becomes clear that labour welfare legislation which is extended to the State of J & K is being violated very frequently, particularly in the area of carpet weaving centres by employment of children below statutory age. That the violation is not being checked is a serious matter, and this has given rise to a total disregard for the law in a very vital sphere.

It would not be out of place to make mention of the efforts made for child welfare and prevention of child labour at the international forums. The International Labour Organisation (ILO) strives for the improvement of labour standards throughout the world. Particular attention has been paid for the protection of employed children by adopting international standards in the forms of 'Conventions' and 'Recommendations'. It has so far adopted no less than eighteen conventions and sixteen recommendations regarding admission of children to employment. The minimum age for the employment of children in industrial undertakings has been raised from 14 to 15 years by virtue of Convention No. 5 of 1919 as revised in 1937 by Convention No. 59. The revised Convention has, however, not been ratified by India. A notable feature of this revised Convention is that it prohibits the employment of children below 15 years of age in those industrial undertakings also where members of the employer's family alone are employed, provided that such employment is dangerous to life, health and morals of the children employed.

The Minimum Age Convention, 1973 (No. 138) is a general convention to gradually replace all other conventions on the

subject. The idea is to achieve total abolition of child labour. It calls for raising progressively the minimum age for admission to employment or work to a level consistent with the fullest physical and mental development of young persons. The minimum age which in no case has to be below 15 years has, under the Convention, been raised to 18 years in case of work which is likely to jeopardise the health, safety or morals of young persons. This Convention, however, has not been ratified by India. Apart from these Conventions and others there are a host of Recommendations aimed at the prevention of child labour.

The National Commission on Labour (1969) while examining the question of child labour observed :

While economic difficulties are real, a way has to be found to give the child the necessary education in his more receptive years.

The Government of India has now evolved national policy for children which it enunciated in 1974. In recognition of the need to make the children robust citizens, physically fit, mentally alert and morally healthy, the resolution of national policy spells out many measures for child welfare including their education and prohibition of their employment.

In 1978, a 16—member committee was set up by the Government of India to examine the existing laws, their inadequacies and implementation and suggest welfare measures. The Committee in its report suggested, *inter alia*, raising the minimum age for employment to 15 years.

The minimum age for employment of children in India, however, remains 14 years under various labour laws, and even that age limit is not being followed, as is evident from the fact of employment of children below the statutory age in various industries and occupations including the carpet weaving centres of Kashmir Valley.

Conclusion and Suggestion

The employment of the children of tender age has been a legacy with India. The capitalist has always exploited the poor

for his self-interest. The post-independence boom in industrialisation and urbanization perpetuated the problem of child labour and the exploitation of workers in general. Many labour welfare laws have been framed by the Parliament, in line with the international Conventions and Recommendations, with a view to prohibit and prevent employment of children in factories and to make provisions for the safety, protection and health of the workmen in general. The experience, however, has revealed that the laws are disregarded for his monetary benefits by the employer. Children of tender age are employed in hazardous and unsafe occupations. Considering the magnitude of the problem, several committees were constituted by the Government of India to look into the problem of child labour and the plight of workers and to suggest remedial measures. The recommendations of the Committees were sometimes accepted and the laws amended in the light of these suggestions. The problem, however, persists. The main problem is in the sphere of implementation of welfare legislation. The whole object of social welfare is defeated due to non-implementation. An actually infected industry is the carpet weaving industry of Kashmir Valley. The carpet weaving centres are spreading on a brisk pace and so is spreading the scourge of child labour. The carpet weaving centres have in recent times been a source of attraction to children for employment. The parents turn a deaf ear, they are unmindful of the health, education, nourishment, mental and moral, of their children. A situation has been reached where the enrolment of children in the primary and middle schools, particularly in villages, is coming down considerably, in some cases, even by 80%. The problem has assumed alarming magnitude and deserves earnest attention. The main reason put forward for child labour is the economic compulsions. At the same time these carpet weaving centres produce us a generation of illiterate, uneducated and ignorant people who are weak physically, mentally as well as educationally. We are thus placed at the crossroads where the choice is between the monetary benefits we lose and the future of our children. If we care for their future we have to bear with monetary losses. The choice, however, by all reasonable standards has to fall on the second alternative *viz.* the care of the future even if we have to undergo monetary loss which in any case is only of temporary nature. Also, economic compul-

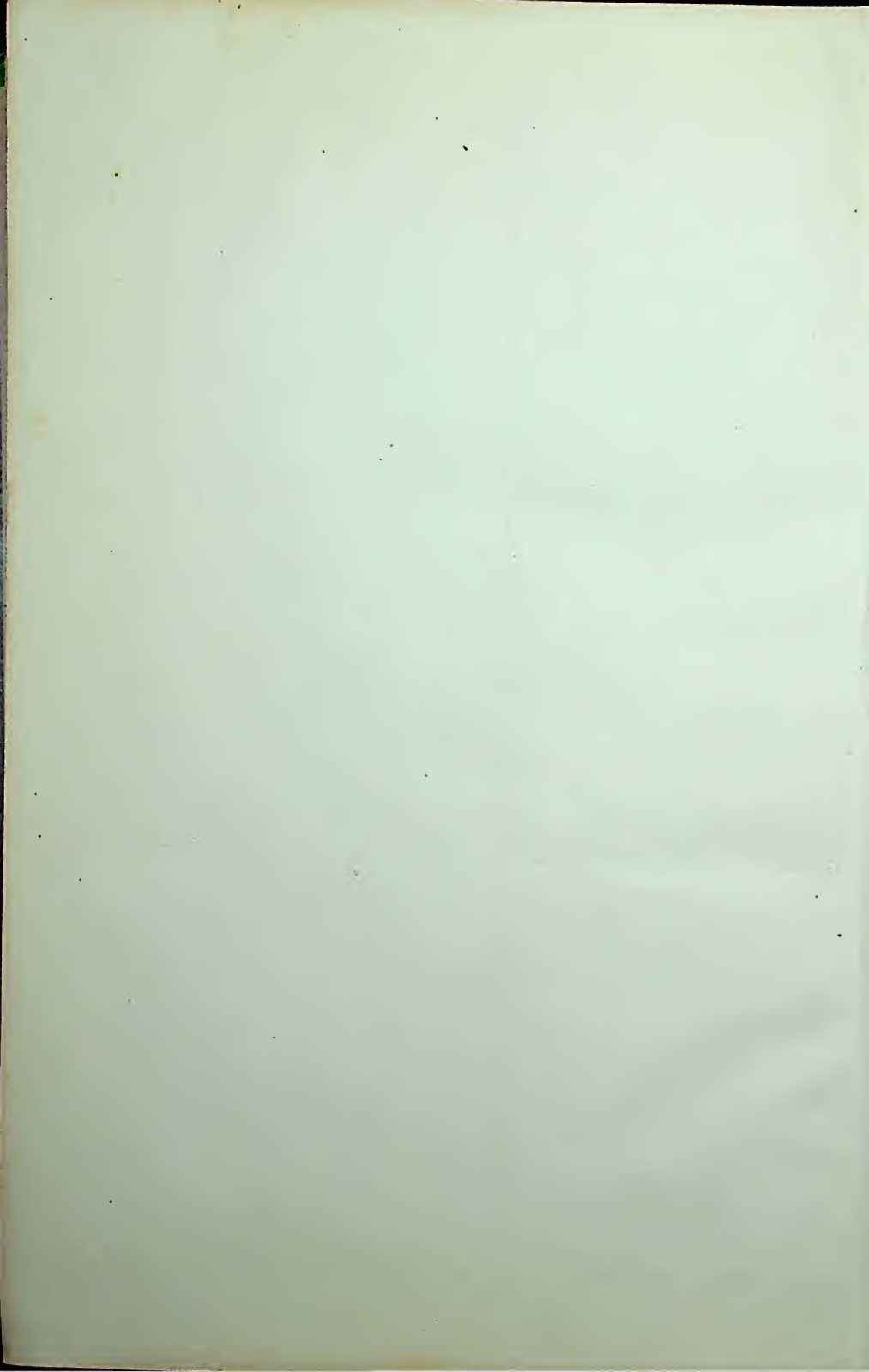
sion may be one, but is not the only cause of child labour. The parent's non-appreciation of the importance of education is another important cause which if rectified will go a long way in solving the problem of child labour. It is seen that some economically well off parents also send their children to work in the carpet weaving and training centres. On the implementation front, it is submitted, we have failed. The object of legislation can be achieved only by implementing the laws that are passed. There should be no reasons political or otherwise for not implementing a law especially when it aims at social welfare as is the case with labour laws. With a view to prevent exploitation of the poor and ignorant masses in the carpet weaving centres of Kashmir, it is suggested :

1. That the people should be educated about the evils of child labour and the benefits of child education.
2. That labour laws should be implemented strictly without any political or other considerations.
3. That in order to bring about effective implementation of labour laws and a proper vigil on the part of the government, sufficient number of persons should be employed for inspection purposes. A good number of field workers should be made available to the department for this purpose.
4. That the nominal fine that is prescribed as an alternative to the punishment of imprisonment should either be abolished or raised to a substantial amount so that it assumes the character of deterrence. However, as a matter of policy the punishment of imprisonment should generally be awarded so that the laws are not easily violated.
5. That heavy penalties for continuing offences be provided.
6. That workshops which persistently contravene the provisions of the law should be closed down.

The first of these is the fact that the United States is a young nation, and that its history is a history of growth and development. The second is the fact that the United States is a nation of immigrants, and that its history is a history of the struggle for the rights of these immigrants. The third is the fact that the United States is a nation of free men, and that its history is a history of the struggle for the rights of these free men. The fourth is the fact that the United States is a nation of law, and that its history is a history of the struggle for the rights of these laws. The fifth is the fact that the United States is a nation of peace, and that its history is a history of the struggle for the rights of these peace.

The sixth is the fact that the United States is a nation of justice, and that its history is a history of the struggle for the rights of these justice. The seventh is the fact that the United States is a nation of liberty, and that its history is a history of the struggle for the rights of these liberty. The eighth is the fact that the United States is a nation of equality, and that its history is a history of the struggle for the rights of these equality. The ninth is the fact that the United States is a nation of unity, and that its history is a history of the struggle for the rights of these unity. The tenth is the fact that the United States is a nation of progress, and that its history is a history of the struggle for the rights of these progress.

The eleventh is the fact that the United States is a nation of hope, and that its history is a history of the struggle for the rights of these hope. The twelfth is the fact that the United States is a nation of faith, and that its history is a history of the struggle for the rights of these faith. The thirteenth is the fact that the United States is a nation of love, and that its history is a history of the struggle for the rights of these love. The fourteenth is the fact that the United States is a nation of truth, and that its history is a history of the struggle for the rights of these truth.



SUPREME CO

Conta

Reports of both P
NON-REPORTABLE

Supreme Co

ANNUAL SUBS.

Rs.346.00—by

Rs.310.00—by

Rs.280.00—by

BACK VOLUMS

Full Set 1969

II(71 volumes)

Leather-bound—

set

Unbound—Rs.

CURRENT

LEGISL

Conta

Central Acts

Regulations, Rule

and also Notificati

Court o

ANNUAL SUBS.

Rs.130.00—by

Rs.110.00—by

Rs.95.00—by B

BACK VOLUMES

Full set 1975 to

Leather-bound—

Unbound—Rs.9



SUPREME COURT CASES

Containing:

*Reports of both REPORTABLE &
NON-REPORTABLE cases of
Supreme Court of India*

ANNUAL SUBS.

Rs.346.00—by Registered Post.

Rs.310.00—by Recorded Delivery

Rs.280.00—by Book Post.

BACK VOLUMES

Full Set 1969 to 1986, Vols.

II(71 volumes)

Leather-bound—Rs. 6,755/-
set

Unbound—Rs. 5,690/- per set

CURRENT CENTRAL LEGISLATION

Containing:

*Central Acts, Ordinances,
Regulations, Rules & Notifications
and also Notifications of the Supreme
Court of India.*

ANNUAL SUBS.

Rs.130.00—by Registered Post.

Rs.110.00—by Recorded Delivery

Rs.95.00—by Book Post.

BACK VOLUMES

Full set 1975 to 1985 (11 volumes)

Leather-bound—Rs.1,100/- per set

Unbound—Rs.935/- per set

Thought Provoking Books

Bhalla, R.S.: The Institution of Property — Legally, Historically and Philosophically Regarded.	1984	80.00
Errabbi, B. (Dr.): Right to Travel Under The Constitution.	1986	50.00
International Bar Association: Challenges to the Legal Profession, Law and Investment in Developing Countries.	1985	200.00
Iyer, V.R. Krishna: Constitutional Miscellany	1986	80.00
Iyer, V.R. Krishna: Law, Justice and Foreign Relations	1986	80.00
Khan, A.R.: A Study of India's Constitution	1982	40.00
Khan, H.: No Roses Nor Thorns.	1985	60.00
Krishnan, P.: Consumer Protection — Legal Control (essay, papers of the U.C.C. National Seminar at University of Cochin)	1984	60.00
Lal, Bhawani: Extraordinary Trials from Law Courts.	1961	6.00
Mahajan, Dr. V.D.: Chief Justice Mehr Chand Mahajan, Foreword by Mr Justice M. Hidayatullah	1969	15.00
Malik, Surendra: Fundamental Rights Cases, 1951-73	1973	40.00
Malik, Surendra: The Fundamental Rights Cases — The Critics Speak!	1975	20.00
Mathew, K.K.: Three Lectures	1983	35.00
Rani, Bilimoria: Female Criminality — A Socio-Legal Study	1986	I.P.
Saraf, D.N.: Social Policy, Law and Protection of Weaker Sections of Society: Proceedings and Papers at the U.G.C. Seminar at University of Jammu with a foreword by V. Khalid, Judge Supreme Court.	1986	I.P.
Sen, A.K., Setalvad, M.C., Pathak, G.S.: Justice for the Common Man	1964	7.50
Sivaramayya, B.: Inequalities and the Law, foreworded by Hon'ble Mr. Justice Y.V. Chandrachud	1984	60.00
Swami, Narasimha: How to Become an Immigrant to Canada and the United States of America	1985	50.00
Varadhachari, V.K.: Legal Fictions	1979	20.00

ISBN—81-7012-339-9

Eastern Book Company, 34, Lalbagh, Lucknow-226 001